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Supreme Court of the United States

OCTOBER TERM, 1950

No. 298

LEO ZITTMAN (WITH WHOM THE CHASE NATIONAL BANK
OF THE CITY OF NEW YORK WAS IMPEADED BELOW),
PETITIONER,

J. HOWARD McGRATH, ATTORNEY GENERAL, AS SUCCESSOR
TO THE ALIEN PROPERTY CUSTODIAN

No. 299

LEO ZITTMAN (WITH WHOM THE FEDERAL RESERVE BANK
OF NEW YORK WAS IMPEADED BELOW), PETITIONER,

J. HOWARD McGRATH, ATTORNEY GENERAL, AS SUCCESSOR
TO THE ALIEN PROPERTY CUSTODIAN

No. 314

JOHN F. McCARTHY (WITH WHOM THE CHASE NATIONAL
BANK OF THE CITY OF NEW YORK WAS IMPEADED
BELOW), PETITIONER,

J. HOWARD McGRATH, ATTORNEY GENERAL, AS SUCCESSOR
TO THE ALIEN PROPERTY CUSTODIAN

No. 315

JOHN F. McCARTHY (WITH WHOM THE FEDERAL RESERVE
BANK OF NEW YORK WAS IMPEADED BELOW), PETI-
TIONER,

J. HOWARD McGRATH, ATTORNEY GENERAL, AS SUCCESSOR
TO THE ALIEN PROPERTY CUSTODIAN

No. 324

JOHN J. McCLOSKEY, AS SHERIFF OF THE CITY OF NEW
YORK (WITH WHOM THE CHASE NATIONAL BANK OF
THE CITY OF NEW YORK, ET AL, WERE IMPEADED BE-
LOW), PETITIONER,

J. HOWARD McGRATH, ATTORNEY GENERAL, AS SUCCESSOR
TO THE ALIEN PROPERTY CUSTODIAN

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

PETITIONS FOR CERTIORARI FILED SEPTEMBER 2, 1950 (CASES 298-299)
PETITIONS FOR CERTIORARI FILED SEPTEMBER 19, 1950 (CASES 314-315)
PETITION FOR CERTIORARI FILED SEPTEMBER 20, 1950 (CASE 324)

CERTIORARI GRANTED NOVEMBER 13, 1950

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1950

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Response to order to show cause by Federal Reserve Bank

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[fol. 1]

**IN THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT**

**J. HOWARD McGRATH, Attorney General, as successor to the
Alien Property Custodian, Petitioner-Appellee,**

. against

CHASE NATIONAL BANK OF THE CITY OF NEW YORK

and

**JOHN J. McCLOSKEY, Jr., as Sheriff of the City of New
York, and LEO ZITTMAN, and JOHN F. MCCARTHY, Re-
spondents-Appellants.**

STATEMENT UNDER RULE XV

This cause was commenced on or about January 30, 1948.

The order to show cause issued pursuant to the petition of Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, petitioner-appellee, was filed on January 30, 1948. The answer of the respondent-appellant, John F. McCarthy, was filed on February 6, 1948. The answer of the respondent-appellant, Leo Zittman, was filed on February 27, 1948. The amended answer of the respondent-appellant, John J. McCloskey, Jr., as Sheriff of the City of New York, was filed on October 20, 1948. The response of the Chase National Bank of the City of New York to the order to show cause was filed on October 20, 1948.

[fol. 2] The respondents have not been arrested nor has any bail been taken or property attached or arrested.

The original parties to this cause are those set forth in the caption hereof, except that Tom C. Clark, as Attorney General, was the original petitioner herein and he was substituted by J. Howard McGrath, who succeeded him as Attorney General since the appeals herein were taken.

The cause came on for hearing on March 5 and March 17, 1948, before the Honorable William Bondy, District Judge.

No question was referred to a Commissioner, Master or Referee.

The final decree was entered on January 20, 1949.

The appeal was taken by the respondent, John F. McCarthy, by notice of appeal filed March 2, 1949; the appeal was taken by the respondent, Leo Zittman, by notice of appeal filed March 7, 1949; and the appeal was taken by the respondent, John J. McCloskey, Jr., as Sheriff of the City of New York, by notice of appeal filed March 18, 1949.

[fol. 3] IN THE UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK

Civ. 44-617

TOM C. CLARK, Attorney General, as successor to the Alien
Property Custodian, Petitioner,

against

CHASE NATIONAL BANK OF THE CITY OF NEW YORK

and

JOHN J. McCLOSKEY, Jr., as Sheriff of the City of New
York, and LEO ZITTMAN, and JOHN F. MCCARTHY, Re-
spondents

ORDER TO SHOW CAUSE—Jan. 23, 1948

Upon the annexed petition of Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, by his attorney, John F. X. McGohey, United States Attorney for the Southern District of New York, sworn to on the 23rd day of January, 1948, and the exhibits annexed thereto, and good cause appearing therefor, it is

Ordered that the respondents herein, Chase National Bank of the City of New York, John J. McCloskey, Jr., Leo Zittman, and John F. McCarthy, respectively, show cause at a motion term of this Court to be held in Room 506, United States Court House, Foley Square, Borough of Manhattan, City of New York, at 10:30 A. M. on the 6th day of February, 1948, or as soon thereafter as counsel may be heard, why a decree should not be entered herein declaring that by virtue of Executive Order No. 6389, as amended and regulations and rulings issued pursuant

[fol. 4] thereto, respondents Zittman and McCarthy, and McCloskey, as Sheriff, obtained no lien or other interest in the Reichsbank-Direktorium or the Deutsche Golddiskontbank accounts, maintained by the respondent Chase National Bank, or in the funds represented thereby, and that by virtue of Vesting-Orders Nos. 7792 and 7870, petitioner is entitled to the entire balances remaining in such accounts, together with all accrued dividends and accumulations, and for such other and further relief as the Court may deem just.

Service of a copy of this order upon the respondents together with copies of the papers upon which it is based, on or before January 30th, 1948, shall be deemed sufficient.

Dated: New York, N. Y., January 23rd, 1948.

John Bright, U. S. D. J.

[fol. 5] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

PETITION

Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, by his attorney, John F. X. McGohey, United States Attorney for the Southern District of New York, prays for an order to show cause against the above-named respondents for the following grounds:

1. This Court has jurisdiction under Section 17 of the Trading with the Enemy Act of October 6, 1917, as amended (40 Stat. 425; United States Code, Title 50, Appendix, Section 17) and under the Federal Declaratory Judgment Act of June 14, 1934, as amended (46 Stat. 955; United States Code, Title 28, Section 400).

2. Respondent Chase National Bank is a national bank with its principal place of business in the City of New York, State of New York, within this District.

3. Respondent John J. McCloskey, Jr., is the duly appointed, qualified and acting Sheriff of the City of New York, and in such capacity is, among other things, the immediate successor of Daniel W. Finn, Jr., as Sheriff of the County of New York, with full power by operation of law to complete the unfinished business of the latter's office; and is a resident of the State of New York.

4
4. Respondent Leo Zittman is, upon information and belief, a resident of the State of New York.

5. Respondent, John F. McCarthy, Jr., is, upon information and belief, a resident of the State of New York.

[fol. 6] 6. For some time prior to June 14, 1941, the Deutsche Reichsbank, the central bank of Germany, a non-resident of the State of New York, maintained a dollar checking account entitled "Reichsbank-Direktorium" with respondent Chase National Bank. On June 14, 1941, with the application of the "freezing" controls of Executive Order No. 8389 (5 Federal Register 1400) to nationals of Germany by Executive Order No. 8785 (6 Federal Register 2897) this checking account was "blocked," the transfer of any interest in the account or the funds represented thereby was proscribed, and all transactions relating thereto were prohibited except as specifically authorized by the Secretary of the Treasury. On June 14, 1941, the balance in this account totalled \$139.00; on December 11, 1941, \$40,401.12; and on April 16, 1942, \$40,592.71.

7. For some time prior to June 14, 1941, the Deutsche Golddiskontbank, a non-resident of the State of New York, maintained a dollar checking account with respondent Chase National Bank. On June 14, with the application of the "freezing" controls of Executive Order No. 8389 (5 Federal Register 1400) to nationals of Germany by Executive Order No. 8785 (6 Federal Register 2897) this checking account was similarly "blocked," and the transfer of any interest in the amount and all other transactions relating thereto were prohibited except as specifically authorized by the Secretary of the Treasury. On June 14, 1941, the balance in this account totalled \$17,132.00, and on December 11, 1941, \$16,604.21.

8. On or about December 11, 1941, respondent Leo Zittman commenced an action in the Supreme Court of the State of New York, Kings County, against Deutsche Reichsbank and Deutsche Golddiskontbank (action No. 16183-1941). Pursuant to a warrant of attachment procured by respondent Zittman, the Sheriff of the County of New York, then Daniel E. Finn, Jr., on or about December 11, 1941, purported to levy upon said accounts of Deutsche Reichsbank and Deutsche Golddiskontbank by serving certified copies of warrants of attachment upon the respondent Chase National Bank. Thereafter,

following the service by publication and mailing of the summons in said action upon Deutsche Reichsbank and Deutsche Golddiskontbank, judgments by default for \$94,609.37 against Reichsbank and for \$56,023.21 against Golddiskontbank were entered, both in favor of respondent Zittman.

9. No specific authorization for Foreign Funds Control for the acquisition of any interest in the "Reichsbank-Direktorium" or the Deutsche Golddiskontbank accounts or the funds represented thereby was ever obtained by respondent Zittman, nor were licenses ever obtained authorizing respondent Chase National Bank to pay the said judgments out of either of the respective "blocked" accounts (Exhibit A). To date no execution has been had on the judgments.

10. On or about January 20, 1942, respondent John F. McCarthy commenced an action in the Supreme Court of the State of New York, Kings County, against Deutsche Reichsbank (Action No. 719-1942). Pursuant to a warrant of attachment procured by respondent McCarthy, the Sheriff of the City of New York, respondent John J. McCloskey, Jr., on or about January 21, 1942, purported to levy upon the said account of Deutsche Reichsbank by serving a certified copy of a warrant of attachment upon the respondent Chase National Bank. Following the service by publication and mailing of the summons in said action upon Deutsche Reichsbank, on April 24, 1942, a judgment against Deutsche Reichsbank by default for \$29,660.21 was entered in favor of respondent McCarthy. [fol. 8] 11. On May 29, 1942, the Foreign Funds Control of the United States Treasury Department denied Application No. NY 401383 of respondent McCarthy, for a license authorizing respondent Chase National Bank to pay said judgment out of the said "blocked" account. No other specific authorization from Foreign Funds Control for the acquisition of any interest in the "Reichsbank-Direktorium" account or the funds represented thereby was ever obtained by respondent McCarthy, nor was any license ever obtained authorizing respondent Chase National Bank to pay the said judgment out of the "blocked" account (Exhibit B). To date no execution has been had on the judgment.

12. On October 3, 1946, James M. Markham, then Alien Property Custodian of the United States, executed Vesting Order No. 7792 (11 Federal Register 11777) vesting, among other things, the debt or other obligation owing to Deutsche Reichsbank by respondent Chase National Bank arising out of said dollar checking account entitled "Reichsbank-Direktorium," including any and all rights to demand, enforce and collect the same (Exhibit C). Under letter of November 26, 1946, Donald C. Cook, the then Acting Head of the Office of Alien Property, the successor in interest to the Alien Property Custodian, served a copy of Vesting Order No. 7792 on respondent Chase National Bank and directed it to forward a check to him for the amount represented by the "Reichsbank-Direktorium" account (Exhibit D).

13. On October 14, 1946, James R. Markham, then Alien Property Custodian of the United States, executed Vesting Order No. 7870 (11 Federal Register 13595) vesting the debt or other obligation owing to Deutsche Golddiskontbank arising out of said dollar checking account maintained in its name, including any and all rights to demand, enforce and collect the same (Exhibit E). Un-[fol. 9] der letter of November 18, 1946, the Chief of the Property Division of the Office of Alien Property served a copy of Vesting Order No. 7870 on respondent Chase National Bank and directed it to pay to the Office of Alien Property the debt represented by the said account (Exhibit F).

14. By Executive Order No. 8799, effective October 15, 1946 (11 Federal Register 11981) all authority, rights, privileges, powers, duties and functions vested in the Office of Alien Property Custodian were vested, transferred and delegated to the Attorney General, and all property or interests vested in or transferred to the Alien Property Custodian or seized by him were transferred to the Attorney General.

15. Under date of August 13, 1947, respondent Chase National Bank acknowledged receipt of the letter of November 26, 1946, and of Vesting Order No. 7792 relating to the "Reichsbank-Direktorium" account referred to the attachments thereon by respondents Zittman and McCarthy, and stated that "in view of warrants of attachment above referred to, we are holding in abeyance the matter

of the payment of the vested balances * * * pending receipt of releases issued by the Sheriff of the City of New York of the warrants of attachment now outstanding" (Exhibit G). Respondent Chase National Bank has continued to refuse to comply with Vesting Order No. 7792.

16. Under date of November 26, 1946, respondent Chase National Bank acknowledged receipt of the letter of November 16, 1946, and of Vesting Order No. 7870 relating to the Deutsche Golddiskontbank account, referred to the attachment thereon by respondent Zittman, and stated that "in view of the warrant of attachment above referred to, we are holding in abeyance the matter of the payment of the amount" represented by said account "pending receipt of a release of the warrant of attachment now outstanding" (Exhibit H). Respondent Chase National Bank [fol. 10] has continued to refuse to comply with Vesting Order No. 7870.

17. No previous application has been made for the relief herein requested.

Wherefore, the petitioner prays that an order issue requiring the respondents to show cause why a decree should not be entered declaring that by virtue of Executive Order No. 8389, as amended, and regulations and rulings issued pursuant thereto, respondents Zittman and McCarthy, and McCloskey, as sheriff, obtained no lien or other interest in the "Reichsbank-Direktorium" or the Deutsche Golddiskontbank accounts, or the funds represented thereby, and that by virtue of Vesting Orders Nos. 7792 and 7870 the petitioner is entitled to the entire balances remaining in the "Reichsbank-Direktorium" and Deutsche Golddiskontbank accounts on the books of the respondent Chase National Bank, together with all accrued dividends and accumulations.

John F. X. McGohey, United States Attorney for the Southern District of New York, By Lawrence H. Axman, Assistant United States Attorney, Attorney for Petitioner.

[fol. 11] * EXHIBIT A, ANNEXED TO PETITION

I, John S. Richards, certify that I am the Director of Foreign Funds Control, Treasury Department, Washington, D. C., and as such have custody of the records and files of Foreign Funds Control and that I have caused diligent search to be made of the records and files of Foreign Funds Control, and no record or entry has been found to exist therein that any specific authorization was ever obtained from this office by Leo Zittman for the acquisition of any interest in the Reichsbank-Direktorium or the Deutsche Golddiskontbank accounts maintained by the Chase National Bank of the City of New York or in the funds represented thereby, or that licenses were ever obtained authorizing the Chase National Bank to pay any judgment in favor of said Zittman out of such "blocked" accounts.

John S. Richards

Subscribed and sworn to before me at Washington, D. C. this 15 day of January 1948.

(Seal) Pearl W. Field, (officer administering oath)

My Commission expires June 21, 1948

[f6l. 12] EXHIBIT B, ANNEXED TO PETITION

I, John S. Richards, certify that I am the Director of Foreign Funds Control, Treasury Department, Washington, D. C., and as such have custody of the records and files of Foreign Funds Control, and that I have caused diligent search to be made of the records and files of Foreign Funds Control, and no record or entry has been found to exist therein that any specific authorization was ever obtained from this office by John F. McCarthy for the acquisition of any interest in the Reichsbank-Direktorium account maintained by the Chase National Bank of the City of New York or in the funds represented thereby, or that a license was ever obtained authorizing the Chase National Bank to pay any judgment in favor of said Mc-

Carthy out of such "blocked" account. Our records, however, disclose that on May 29, 1942, this office denied Application No. NY 401383 filed by Henry I. Fillman, as attorney for said McCarthy, dated April 25, 1942 for a license authorizing the Chase National Bank of the City of New York to pay out of the "blocked" account of the Reichsbank a portion of a judgment obtained in favor of said McCarthy in an action in the Supreme Court of the State of New York, Kings County, entitled, "John F. McCarthy, plaintiff, against Reichsbank, defendant."

John S. Richards

Subscribed and sworn to before me at Washington, D. C. this 15 day of January 1948.

Pearl W. Field (officer administering oath)

My Commission expires June 21, 1948

[fol. 13]

EXHIBIT C, ANNEXED TO PETITION
UNITED STATES OF AMERICA

Office of Alien Property Custodian

Vesting Order Number 7792

Re: Bank account owned by Deutsche Reichsbank

Under the authority of the Trading with the enemy Act, as amended, and Executive Order No. 9095, as amended, and pursuant to law, the undersigned, after investigation, finding:

1. That Deutsche Reichsbank, the last known address of which is Berlin, Germany, is a corporation, organized under the laws of Germany, and which has or, since the effective date of Executive Order No. 8389, as amended, has had its principal place of business in Germany and is a national of a designated enemy country (Germany);

2. That the property described as follows:

a. That certain debt or other obligation owing to Deutsche Reichsbank, by The Chase National Bank of the City of New York, 18 Pine Street, New

York, New York, arising out of a dollar checking account, entitled Reichsbank-Direktorium, and any and all rights to demand, enforce and collect the same,

- b. That certain debt or other obligation owing to Deutsche Reichsbank, by The Chase National Bank of the City of New York, 18 Pine Street, New York, New York, arising out of a dollar checking account, entitled Deutsche Reichsbank, Westpapierabteilung, FS62971, and any and all rights to demand, enforce and collect the same, and

[fol. 14] c. That certain debt or other obligation owing to Deutsche Reichsbank, by The Chase National Bank of the City of New York, 18 Pine Street, New York, New York, arising out of a dollar checking account, entitled General Ruling No. 6 Account, Deutsche Reichsbank, Westpapierabteilung F62971, and any and all rights to demand, enforce and collect the same,

is property within the United States owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by, the aforesaid national of a designated enemy country;

And determining that to the extent that such national is a person not within a designated enemy country, the national interest of the United States requires that such person be treated as a national of a designated enemy country (Germany);

And having made all determinations and taken all action required by law, including appropriate consultation and certification, and deeming it necessary in the national interest,

Hereby Vests in the Alien Property Custodian the property described above, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest and for the benefit of the United States.

Such property and any or all of the proceeds thereof shall be held in an appropriate account or accounts, pending further determination of the Alien Property Custodian. This Order shall not be deemed to constitute an admission by the Alien Property Custodian of the lawfulness of,

or acquiescence in, or licensing of, any set-offs, charges or deductions, nor shall it be deemed to limit the power [fol. 15] of the Alien Property Custodian to return such property or the proceeds thereof in whole or in part, nor shall it be deemed to indicate that compensation will not be paid in lieu thereof, if and when it should be determined to take any one or all of such actions.

The terms "national" and "designated enemy country" as used herein shall have the meanings prescribed in Section 10 of Executive Order No. 9095, as amended.

Executed at Washington, D. C., on October 3, 1946.
(Official Seal)

(Signed) James E. Markham, James E. Markham,
Alien Property Custodian.

I hereby certify that the within is a true and correct copy of the original paper on file in this office.

For the Attorney General

David L. Bazelon, Assistant Attorney General
Director, Office of Alien Property

By Loyola M. Blanton, Assistant Secretary for
Records

[fol. 16] EXHIBIT D, ANNEXED TO PETITION

F 28-1282-E-12, V. O. No. 7792, DCC:JJE:EJC

November 26, 1946

The Chase National Bank of the City of New York, 18
Pine Street, New York City, New York

Gentlemen:

Enclosed is a certified copy of Vesting Order No. 7792 executed by the Alien Property Custodian on October 3, 1946, vesting in himself as Alien Property Custodian "Bank Account owned by Deutsche Reichsbank."

By Executive Order 9788, effective October 15, 1946, the Office of Alien Property Custodian was terminated and all authority, rights, privileges, powers, duties and functions

vested in such office or in the Alien Property Custodian, were transferred to and vested in the Attorney General of the United States to be administered by him and such officers and agencies of the Department of Justice as he might designate and all property or interests vested in or transferred to the Alien Property Custodian or seized by him, and all proceeds thereof, which were held or administered by him on the effective date of this order were transferred to the Attorney General. (11 F. R. 11981)

Effective, October 15, 1946, the Attorney General issued his Order No. 3732, Supplement 19, establishing in the Department of Justice the "Office of Alien Property" and delegating to such office all power and authority vested in or transferred to him by Executive Order 9788. (Title 28 §51.81 (a), 11 F. R. 12045)

Under date of October 17, 1946, the Acting Head of the Office of Alien Property issued regulations and delegations of final authority, approved by the Attorney General, [fol. 17] which provide, among other things, "(b) All Special Regulations, * * * Vesting Orders, * * * instructions, directions, * * * demands, authorizations, notices and forms and all other instruments whatsoever issued by or under the authority of the Alien Property Custodian are hereby affirmed, ratified and continued in effect according to their terms * * *. In any such instrument any provision having a prospective effect shall be construed as if any references therein to the Alien Property Custodian were a reference to the Attorney General and any reference therein to the Office of Alien Property Custodian were a reference to the Office of Alien Property, unless the context otherwise requires.

"(c) Any instrument which might lawfully be issued by or under the authority of the Attorney General shall not be invalid for the reason that it contains the designation 'Alien Property Custodian' or 'Office of Alien Property Custodian' or the name 'Leo T. Crowley' or 'James E. Markham' but shall be construed as though it contained the designation of the Attorney General or of the Office of Alien Property, as the case may be, unless the context otherwise requires." (11 F. R. 12436)

For the purpose of identifying the account of the Deutsche Reichsbank on the books and records of the Of-

Office of Alien Property, Account No. 28-18101 has been assigned.

With reference to that certain debt or other obligation owing to Deutsche Reichsbank by The Chase National Bank of the City of New York, arising out of a dollar checking account entitled Reichsbank-Direktorium, more fully described in subparagraph 2a of Vesting Order No. 7792, the balance of which was reported as of September 10, 1945, to amount to \$40,698.02, you are authorized and directed to forward your check for that amount, plus any accretions thereto, to the Office of Alien Property, Department of Justice, Washington 25, D. C., attention of the Property Division.

With reference to that certain debt or other obligation owing to Deutsche Reichsbank by The Chase National Bank of the City of New York, arising out of a dollar checking account entitled Deutsche Reichsbank, more fully described in subparagraph 2b of Vesting Order No. 7792, and reported to amount to \$68.50, as of September 10, 1945, you are authorized and directed to forward your check for that amount, plus any accretions thereto, to the Office of Alien Property, Department of Justice, Washington 25, D. C., attention of the Property Division.

As to that certain debt or other obligation owing to Deutsche Reichsbank by The Chase National Bank of the City of New York, arising out of a dollar checking account entitled General Ruling No. 6 Account, Deutsche Reichsbank, Westpapierabteilung F 62971, more fully described in subparagraph 2c of Vesting Order No. 7792, reported on September 10, 1945 as amounting to \$75.15, you are authorized and directed to forward your check for that amount, plus any accretions thereto, to the Office of Alien Property, Department of Justice, Washington 25, D. C., attention of the Property Division.

All checks are to be made payable to the order of the "Attorney General of the United States, Account No. 28-18101."

Please sign the acknowledgment on the attached copy of this letter and return the same in the franked addressed envelope enclosed herein for that purpose.

Very truly yours, Donald C. Cook, Acting Head, Office of Alien Property.

[fol. 19] EXHIBIT E, ANNEXED TO PETITION

UNITED STATES OF AMERICA

Office of Alien Property Custodian

Vesting Order Number 7870

Re: Bank account owned by Deutsche Golddiskontbank

Under the authority of the Trading with the enemy Act, as amended, and Executive Order No. 9095, as amended, and pursuant to law, the undersigned, after investigation, finding:

1. That Deutsche Golddiskontbank, the last known address of which is Berlin, Germany, is a corporation, organized under the laws of Germany, and which has or, since the effective date of Executive Order No. 8389, as amended, has had its principal place of business in Germany and is a national of a designated enemy country (Germany);

2. That the property described as follows:

That certain debt or other obligation owing to Deutsche Golddiskontbank, by The Chase National Bank of the City of New York, 18 Pine Street, New York, New York, arising out of a dollar checking account, entitled Deutsche Golddiskontbank, and any and all rights to demand, enforce and collect the same,

is the property within the United States owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by, the aforesaid national of a designated enemy country;

[fol. 20] And determining that to the extent that such national is a person not within a designated enemy country, the national interest of the United States requires that such person be treated as a national of a designated enemy country (Germany);

And having made all determinations and taken all action required by law, including appropriate consultation and certification, and deeming it necessary in the national interest,

Hereby Vests in the Alien Property Custodian the property described above, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest and for the benefit of the United States.

Such property and any or all of the proceeds thereof shall be held in an appropriate account or accounts, pending further determination of the Alien Property Custodian. This Order shall not be deemed to constitute an admission by the Alien Property Custodian of the lawfulness of, or acquiescence in, or licensing of, any set-offs, charges or deductions, nor shall it be deemed to limit the power of the Alien Property Custodian to return such property or the proceeds thereof in whole or in part, nor shall it be deemed to indicate that compensation will not be paid in lieu thereof, if and when it should be determined to take any one or all of such actions.

The terms "national" and "designated enemy country" as used herein shall have the meanings prescribed in Section 10 of Executive Order No. 9095, as amended.

Executed at Washington, D. C., on October 14, 1946.

(Official Seal)

Signed) James E. Markham, Alien Property Custodian.

[fol. 21] I hereby certify that the within is a true and correct copy of the original paper on file in this office.

For the Attorney General, David L. Bazelon, Assistant Attorney General, Director, Office of Alien Property.

By Loyola M. Blanton, Assistant Secretary for Records.

[fol. 22] EXHIBIT F, ANNEXED TO PETITION

Copy. F-28-855 E-2, V. O. No. 7870, Section 2(c), THC:
FAM:sk

OFFICE OF ALIEN PROPERTY
Department of Justice
120 Broadway

New York City 5, New York
November 18, 1946

The Chase National Bank of the City of New York, 18 Pine
Street, New York City.

Re: Bank account owned by Deutsche Golddiskontbank

Gentlemen:

Enclosed is a certified copy of Vesting Order No. 7870, executed by the Alien Property Custodian on October 14, 1946, vesting in himself as Alien Property Custodian that certain dollar checking account with The Chase National Bank of the City of New York, 18 Pine Street, New York City, entitled Deutsche Golddiskontbank, Berlin, Germany.

By executive Order 9788, effective October 15, 1946, the Office of Alien Property Custodian was terminated and all authority rights, privileges, powers, duties and functions vested in such office or in the Alien Property Custodian were transferred to and vested in the Attorney General of the United States to be administered by him and such officers and agencies of the Department of Justice as he might designate and all property or interests vested in or transferred to the Alien Property Custodian or seized by [fol. 23] him, and all proceeds thereof, which were held or administered by him on the effective date of this order were transferred to the Attorney General.

(11 F.R. 11981)

Effective October 15, 1946, the Attorney General issued his Order No. 3732, Supplement 19, establishing in the Department of Justice the "Office of Alien Property" and delegating to such office all power and authority vested in or transferred to him by Executive Order 9788 (Title 28 §51.81 (a), 11 F. R. 12045).

Under date of October 17, 1946, the Acting Head of the Office of Alien Property issued regulations and delegations

of final authority, approved by the Attorney General, which provide, among other things, "(o) All Special Regulations, * * * Vesting Orders, * * * instructions, directions, * * * demands, authorizations, notices and forms and all other instruments whatsoever issued by or under the authority of the Alien Property Custodian are hereby affirmed, ratified and continued in effect according to their terms * * *. In any such instrument any provision having a prospective effect shall be construed as if any reference therein to the Alien Property Custodian, were a reference to the Attorney General and any reference therein to the Office of Alien Property Custodian were a reference to the Office of Alien Property, unless the context otherwise requires.

"(c) Any instrument which might lawfully be issued by or under the authority of the Attorney General shall not be invalid for the reason that it contains the designation 'Alien Property Custodian' or 'Office of Alien Property Custodian' or the same 'Leo T. Crowley' or 'James E. Markham' but shall be construed as though it contained the designation of the Attorney General or of the Office of Alien Property, as the case may be, unless the context otherwise requires" (500.41 of the Rules of the Office of Alien Property: 11 F. R. 12436).

[fol. 24] The records of this office indicate that this account contained a balance of \$16,604.21 as of September 10, 1945.

For the purpose of identifying the account on the books and records of the Office of Alien Property, Account No. 28-18541 has been assigned.

You are hereby authorized and directed to pay to the Office of Alien Property, 120 Broadway, New York, N. Y., attention Property Division, the above described debt or other obligation, including any interest due thereon and any accretions thereto. The check should be made payable to the order of the "Attorney General of the United States, Account No. 28-18541," and should be accompanied by a complete statement in duplicate showing all interests and accretions to, and all charges against the account since September 10, 1946, to the present date.

Please sign the acknowledgment on the attached copy of this letter and return the same in the franked addressed envelope enclosed herein for that purpose.

Very truly yours, /s/ Thomas H. Creighton, Jr.,
Chief, Property Division.

Encl.

Receipt is acknowledged of the original of this demand and a certified copy of Vesting Order No. 7870 this 20th day of November, 1946.

(Signature illegible) John Prentice, 2nd Vice President.

[fol. 25] EXHIBIT G, ANNEXED TO PETITION

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK
New York

Pine Street Corner of Nassau, New York 15, N. Y.

August 13, 1947

In Replying Please Refer to 1-23

Office of Alien Property, Department of Justice, Washington 25, D. C.

Re: File No. F 28-1282-E-12

V. O. No. 7792, DCC:JJE:AFW:MJC

Gentlemen:

In some unaccountable manner your letter of November 26, 1946 enclosing a certified copy of Vesting Order No. 7792 was mislaid and has just come to light.

We now acknowledge receipt of your letter of November 26, 1946 enclosing a certified copy of Vesting Order No. No. 7792 executed by the Alien Property Custodian on October 3, 1946 and vesting in the Attorney General of the United States

- (a) That certain debt or other obligation owing to Deutsche Reichsbank, by The Chase National Bank of the City of New York, 18 Pine Street, New York, New York, arising out of a dollar checking account,

entitled Reichsbank-Direktorium, and any and all rights to demand, enforce and collect the same.

- (b) That certain debt or other obligation owing to Deutsche Reichsbank, by The Chase National Bank [fol. 26] of the City of New York, 18 Pine Street, New York, New York, arising out of a dollar checking account, entitled Deutsche Reichsbank, Wertpapierabteilung, FS62971, and any and rights to demand, enforce and collect the same, and
- (c) That certain debt or other obligation owing to Deutsche Reichsbank, by The Chase National Bank of the City of New York, 18 Pine Street, New York, New York, arising out of a dollar checking account, entitled General Ruling No. 6 Account, Deutsche Reichsbank, Wertpapierabteilung F62971, and any and all rights to demand, enforce and collect the same.

On December 11, 1941 we were served with a Warrant of Attachment in an action in the Supreme Court, Kings County, by Leo Zittman, Plaintiff, vs. Reichsbank and Deutsche Golddiskontbank, Defendants, to recover the sum of \$68,940. with interest, against the defendant Reichsbank and \$40,230. with interest, against the defendant Deutsche Golddiskontbank, together with costs and expenses in each instance and on April 16, 1942 we were served with a Warrant of Attachment in an action in the Supreme Court, Kings County by John F. McCarthy, Plaintiff, vs. Reichsbank, Defendant, to recover the sum [fol. 27] of \$24,810. plus interest, costs and expenses.

At the time of the service of the first Warrant of Attachment on December 11, 1941 in suit of Leo Zittman, the account of Reichsbank-Direktorium reflected a balance of \$40,401.12 which we reported to the Sheriff subject to Executive Order 8389 as amended and to such other Orders and Decrees as may be applicable thereto and as of April 16, 1942, the date on which the second Warrant of Attachment was served upon us in suit of John F. McCarthy, the account of the Reichsbank-Direktorium reflected a balance of \$40,592.71 which included the sum of \$40,401.12 previously reported to the Sheriff under the Leo Zittman Attachment, or an increase of \$191.59.

We certified to the Sheriff pursuant to the Warrant of

Attachment served in the John F. McCarthy suit, a balance of \$40,592.71 in the account of the Reichsbank-Direktorium subject to Executive Order 8389 as amended and to such other Orders and Decrees as may be applicable thereto and in our Return on the John F. McCarthy Attachment, referred to the service upon us under date of December 11, 1941 of a prior Warrant of Attachment in suit of Leo Zittman.

The accounts mentioned in paragraphs B and C of the Vesting Order were set up to handle the income from securities which we held in custody for Deutsche Reichsbank, Wertpapier, and in both of our Returns we included a statement to the effect that we were holding in custody certain securities set forth in a photostatic schedule enclosed with each of our Returns for the account of the Deutsche Reichsbank, Wertpapier, subject to Executive Order 8389 as amended and to such other Orders and Decrees as may be applicable thereto in that the balances in the dollar account of the Reichsbank-Direktorium were inadequate to satisfy the attaching creditors' claims.

We were served with serial Extension Orders preserving the Sheriff's rights to commence actions to reduce to possession the property attached, to the respective dates of March 11, 1948 and April 22, 1948 in the Leo Zittman and John F. McCarthy actions.

In view of the Warrants of Attachment above referred to, we are holding in abeyance the matter of the payment of the vested balances in the form of our check to the order of the "Attorney General of the United States, Account No. 28-18101" pending receipt of Releases issued by the Sheriff of the City of New York of the Warrants of Attachment now outstanding.

We wish to apologize for the delay in acknowledging the letter under discussion and regret any inconvenience the oversight may have occasioned you.

Yours very truly, /s/ Robert V. Wilson, Assistant
Cashier.

EGH:M

[fol. 29] EXHIBIT H, ANNEXED TO PETITION .

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK
New York

November 26, 1946

Mr. Thomas H. Creighton, Jr., Chief, Property Division,
Office of Alien Property, 120 Broadway, New York 5,
N. Y.

Dear Sir:

Reference: F-28-855 E-2 V. G. No. 7870

Section 2(c) THC:FAM:sk

We have for acknowledgment your letter of November 18th enclosing certified copy of Vesting Order No. 7870 executed by the Alien Property Custodian on October 14, 1946 vesting in himself as Alien Property Custodian:

"That certain debt or other obligation owing to Deutsche Golddiskontbank, by The Chase National Bank of the City of New York, 18 Pine Street, New York, New York, arising out of a dollar checking account, entitled Deutsche Golddiskontbank, and any and all rights to demand, enforce and collect the same."

On December 11, 1941 we were served with a Warrant of Attachment in an action in the Supreme Court, Kings County by Leo Zittman, Plaintiff, vs. Reichsbank and Deutsche Golddiskontbank, Defendants, to recover the [fol. 30] sum of \$68,940. with interest against the Defendant, Reichsbank and \$40,230. with interest against the Defendant, Deutsche Golddiskontbank.

The credit balance in the Dollar account of Deutsche Golddiskontbank at the time of the service of the Warrant of Attachment was \$16,604.21 and we so advised the Sheriff of the City of New York under date of March 19, 1942. The Sheriff, of course, was informed that the account was subject to Executive Order No. 8389 as amended. Extension Orders extending the time within which the Sheriff shall reduce to possession the funds attached have been filed from time to time and the last Extension Order which was served February 18, 1946 carried an expiry date of March 11, 1947.

In view of the Warrant of Attachment above referred to, we are holding in abeyance the matter of the payment of the amount of \$16,604.21 in the form of our check to the order of the "Attorney General of the United States, Account No. 28-18541" pending receipt of a release of the Warrant of Attachment now outstanding.

For your information we, on or about January 30, 1946 received a letter from Mr. Henry Mann, 63 Wall Street, New York City, claiming an amount of \$1,290. against the funds of Deutsche Golddiskontbank, Berlin on our books in connection with which we wrote Mr. James E. Markham, Alien Property Custodian, Washington, D. C. under date of February 1, 1946.

Yours very truly, /s/ John Prentice, Second Vice
President.

[fol. 31] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

RESPONSE TO ORDER TO SHOW CAUSE BY THE CHASE NATIONAL
BANK

The respondent, The Chase National Bank of the City of New York, for its response to the order to show cause made herein by Honorable John Bright, United States District Judge, dated January 23, 1948, directing the respondents herein to show cause why a decree should not be entered herein declaring that by virtue of Executive Order No. 8389, as amended, and regulations and rulings issued pursuant thereto, respondents Zittman and McCarthy and McCloskey, as Sheriff, obtained no lien or other interest in the Reichsbank-Direktorium or the Deutsche Golddiskontbank accounts maintained by the respondent Chase National Bank, or in the funds represented thereby, and that by virtue of Vesting Orders Nos. 7792 and 7870 petitioner is entitled to the entire balances remaining in such accounts, together with all accrued dividends and accumulations, and for such other and further relief as the court may deem just, by its attorneys Milbank, Tweed, Hope & Hadley, respectively shows as follows on information and belief:

Respondent, The Chase National Bank of the City of

New York (hereinafter called the Chase) for its answer to the petition herein:

(1) Denies each and every allegation of fact set forth in paragraph 6 thereof except that it admits (a) that for sometime prior to June 14, 1941, The Deutsche Reichsbank, the central bank of Germany, a non-resident of the State of New York, maintained a dollar checking account entitled "Reichsbank-Direktorium" with the Chase; (b) that on June 14, 1941, there was issued and was applicable [fol. 32] to the said account Executive Order No. 8785 (6 Federal Register 2897) amending Executive Order No. 8389 (5 Federal Register 1400), for the contents and purported effect of which orders reference is hereby had to the orders themselves with the same force and effect as if they were here set forth at length; (c) that on June 14, 1941, the balance in the current dollar checking account entitled "Reichsbank-Direktorium" totaled \$139.00; on December 11, 1941, \$40,401.12; and on April 16, 1942, \$40,592.71.

(2) Denies each and every allegation of fact set forth in paragraph 7 thereof except that it admits (a) that for some time prior to June 14, 1941, the Deutsche Golddiskontbank, a German bank and a non-resident of the State of New York, maintained a dollar checking account with the Chase; (b) that on June 14, 1941, there was issued and was applicable to the said account Executive Order No. 8785 (6 Federal Register 2897), amending Executive Order No. 8389 (5 Federal Register 1400), for the contents and purported effect of which orders reference is hereby had to the orders themselves with the same force and effect as if they were here set forth at length; and (c) that on June 14, 1941, the balance in the said dollar checking account of Deutsche Golddiskontbank totaled \$17,132.00 and on December 11, 1941, \$16,604.21.

(3) With reference to paragraph 8, admits and alleges that on December 11, 1941, pursuant to a warrant of attachment procured by respondent, Zittman, the Sheriff of the County of New York, then Daniel E. Finn, Jr., levied upon the said accounts of Deutsche Reichsbank and Deutsche Golddiskontbank by serving a certified copy of the warrant of attachment upon the Chase.

(4) Denies that it has any knowledge or information

sufficient to form a belief as to the truth of the allegations [fol. 33] set forth in paragraph 9 thereof, except that it (a) admits that no license was ever exhibited to it authorizing it to make a payment or transfer of credit out of either of the said accounts to or on behalf of respondent, Zittman, or to pay the judgments referred to in paragraph 8 of the petition herein, and alleges that no such payment or transfer of credit has been made by it; and (b) admits that no execution has been had against the said accounts on the said judgments.

(5) With respect to paragraph 10 thereof, denies that the levy by service upon the Chase of a certified copy of a warrant of attachment secured by respondent, McCarthy, took place on January 21, 1942, and admits and alleges that on April 16 1942, pursuant to a warrant of attachment procured by respondent, McCarthy, the Sheriff of the City of New York, John J. McCloskey, Jr., levied on the said account of Deutsche Reichsbank by serving a certified copy of the warrant of attachment upon the Chase.

(6) Denies that it has any knowledge or information sufficient to form a belief as to the truth of the allegations, set forth in paragraph 11 thereof, except that it (a) admits that no license was ever exhibited to it authorizing it to make a payment or transfer of credit out of the said account in the name of "Reichsbank-Direktorium" to or on behalf of respondent, McCarthy, or to pay the judgment referred to in paragraph 10 of the petition herein; and alleges that no such payment or transfer of credit has been made by it; and (b) admits that no exception has been had against the said account on the said judgment.

(7) Denies each and every allegation of fact set forth in paragraph 12 thereof, except that it admits (a) that under date of October 3, 1946, James E. Markham, then [fol. 34] Alien Property Custodian of the United States, executed Vesting Order No. 7792 (11 Federal Register 11777), for the contents and purported effect of which reference is hereby made to the said order with the same force and effect as if it were here set forth at length, and (b) that a letter dated November 26, 1946, as set forth in Exhibit D attached to the petition, from Donald C. Cook, the then acting head of the Office of Alien Property, the

successor in interest to the Alien Property Custodian, enclosing a copy of Vesting Order No. 7792, was forwarded to the Chase, for the contents and purported effect of which letter reference is hereby made thereto with the same force and effect as if it were here set forth at length. The Chase alleges that the effective date of the said Vesting Order is October 9, 1946.

(8) Denies each and every allegation of fact set forth in paragraph 13 thereof, except that it admits (a) that under date of October 14, 1946, James E. Markham, then Alien Property Custodian of the United States, executed Vesting Order No. 7870 (11 Federal Register 13595) for the contents and purported effect of which reference is hereby had to the said order with the same force and effect as if it were here set forth at length; (b) that a letter dated November 18, 1946, as set forth in Exhibit F attached to the petition, from the Chief of the Property Division of the Office of Alien Property, enclosing a copy of Vesting Order No. 7870, was forwarded to the Chase, for the contents and purported effect of which reference is hereby made thereto with the same force and effect as if it were here set forth at length. The Chase alleges that the effective date of the said Vesting Order is November 18, 1946.

(9) Denies each and every allegation of fact set forth in paragraph 15 thereof, except that it admits that under [fol. 35] date of August 13, 1947, it sent to the Office of Alien Property the letter set forth in Exhibit G attached to the petition herein.

(10) Denies each and every allegation of fact set forth in paragraph 16 thereof, except that it admits that under date of November 26, 1946, it sent to the Office of Alien Property the letter set forth in Exhibit H attached to the petition herein.

The respondent Chase, by way of further defense, further shows:

First Defense

(11) On December 11, 1941, in the action in the Supreme Court of the State of New York entitled "Leo Zittman, Plaintiff, against Reichsbank and Deutsche Gold-diskontbank, Defendants," Charles J. Dodd, a Justice of the Supreme Court of the State of New York, on the ap-

plication of the said Zittman, duly and regularly issued a warrant of attachment, pursuant to the provisions of the Civil Practice Act of the State of New York, directed to the Sheriff of any county of New York State, commanding that the Sheriff attach and safely keep so much of the property of the defendant, Reichsbank, as would satisfy the said Zittman's demand in the said action of \$68,940, with accrued interest thereon, and costs and expenses, and so much of the property of the defendant, Deutsche Golddiskontbank, as would satisfy said Zittman's demand in said action for \$40,230 with accrued interest thereon, and costs and expenses. On December 11, 1941, Daniel E. Finn, Jr., Sheriff of the County of New York, by Deputy Sheriff, Michael Cnozzo, duly and regularly executed the said warrant of attachment and levied upon the accounts of the said Reichsbank and Deutsche Golddiskontbank [fol. 36] with the Chase, in the manner prescribed by the Civil Practice Act, by serving upon the Chase a certified copy of said warrant of attachment (a copy of which, together with a copy of the certificate of the said Sheriff thereto annexed, is attached hereto as Exhibit A).

(12) Pursuant to the said warrant of attachment and upon demand of the Sheriff, the Chase made certification to the Sheriff under date of March 19, 1942 (a copy of which certification is attached hereto as Exhibit B), that there was at the time of service of the warrant a credit balance of \$40,401.12 in a deposit account in the name of Reichsbank-Direktorium, and a credit balance of \$16,604.21 in a deposit account in the name of Deutsche Golddiskontbank; that certain securities were held by the Chase as custodian for Deutsche Reichsbank Wertpapier, and certain securities were held by the Chase as custodian for Deutsche Golddiskontbank, but that the Chase was not informed of what interest Deutsche Reichsbank Wertpapier or Deutsche Golddiskontbank had in the securities and/or the proceeds thereof held for the respective accounts; and that certain collection items on which payment had been refused were also held by the Chase as custodian for Reichsbank-Direktorium. The Chase further reported that the above funds, securities and other instruments were held subject to Executive Order No. 8389 as amended.

(13) The Chase has not at any time made any payment

or transferred, paid or delivered any property to the said Sheriff, or any successor thereof, or to any other party pursuant to the said warrant of attachment.

(14) The Chase has from time to time been duly and regularly served, in accordance with provisions of the Civil Practice Act, with certified copies of court orders of the Supreme Court of the State of New York, County [fol. 37] of Kings, in the above-mentioned action of Zittman v. Reichsbank and Deutsche Golddiskontbank, extending the time within which the Sheriff might commence an action or special proceeding to reduce to custody the personal property and to collect, receive and enforce the debts, effects and things in action attached by him: to wit, an order dated March 5, 1942, extending the said time to and including June 11, 1942; an order dated June 8, 1942, extending the said time to and including September 11, 1942; an order dated September 5, 1942, extending the said time to and including December 11, 1942; an order dated December 7, 1942, extending the said time to and including March 11, 1943; an order dated March 9, 1943, extending the said time to and including March 11, 1944; an order dated February 9, 1944, extending the said time to and including March 11, 1945; an order dated January 13, 1945, extending the said time to and including March 11, 1946; an order dated January 28, 1946, extending the said time to and including March 11, 1947; an order dated February 5, 1947, extending the said time to and including March 11, 1948; and an order dated January 27, 1948, extending the said time to and including March 11, 1949.

(15) The above-mentioned warrant of attachment in the action entitled "Leo Zittman, Plaintiff, against Reichsbank and Deutsche Golddiskontbank, Defendants," has never been vacated or modified, nor has the attachment thereunder been released or otherwise discharged.

(16) On January 21, 1942, in the action in the Supreme Court of the State of New York entitled "John F. McCarthy, Plaintiff, against Reichsbank, Defendant," Meier Steinbrink, a Justice of the Supreme Court of the State of New York, on the application of the said McCarthy, duly and regularly issued a warrant of attachment pursuant to the provisions of the Civil Practice Act of the [fol. 38] State of New York directed to the Sheriff of the City of New York, commanding that the Sheriff attach and

safely keep so much of the property of the defendant, Reichsbank, as would satisfy the said McCarthy's demand in the said action of \$24,810, with accrued interest thereon from May 30, 1939, and costs and expenses. On April 16, 1942, John J. McCloskey, Jr., Sheriff of the City of New York, by Deputy Sheriff Frances Bauman, duly and regularly executed the said warrant of attachment and levied upon the accounts of the said Reichsbank with the Chase, in the manner prescribed by the Civil Practice Act, by serving upon the Chase a certified copy of said warrant of attachment (a copy of which, together with a copy of the certificate of the said Sheriff thereto annexed, is attached hereto as Exhibit C).

(17) Pursuant to the said warrant of attachment and upon demand of the Sheriff, the Chase made certification to the Sheriff under date of April 21, 1942 (a copy of which certification is attached hereto as Exhibit D), that there was at the time of service of the warrant a credit balance of \$40,592.71 in a deposit account in the name of Reichsbank-Direktorium; that certain securities were held by the Chase as custodian for Deutsche Reichsbank Wertpapier, but that the Chase was not informed of what interest Deutsche Reichsbank Wertpapier had in the securities and/or the proceeds thereof held for its account; and that certain collection items on which payment had been refused were also held by the Chase as custodian for Reichsbank-Direktorium. The Chase further reported that the above funds, securities and other instruments were held subject to Executive Order No. 8389 as amended, and that there had previously been served upon the Chase a warrant of attachment in *Zittman v. Reichsbank and Deutsche Golddiskontbank*.

[fol. 39] (18) The Chase has not at any time made any payment or transferred, paid or delivered any property to the said Sheriff, or any successor thereof, or to any other party, pursuant to the said warrant of attachment.

(19) The Chase has from time to time been duly and regularly served, in accordance with provisions of the Civil Practice Act, with certified copies of court orders of the Supreme Court of the State of New York, County of Kings, in the above-mentioned action of *McCarthy v. Reichsbank*, extending the time within which the Sheriff

might commence an action or special proceeding to reduce to custody the personal property and to collect, receive and force the debts, effects and things in action attached by him; to wit, an order dated April 17, 1942, extending the said time to and including July 21, 1942; an order dated July 16, 1942, extending the said time to and including October 21, 1942; an order dated October 16, 1942, extending the said time to and including January 21, 1943; an order dated January 18, 1943, extending the said time to and including April 21, 1943; an order dated April 16, 1943, extending the said time to and including April 21, 1944; an order dated April 12, 1944, extending the said time to and including April 21, 1945; an order dated April 11, 1945, extending the said time to and including April 22, 1946; an order dated April 15, 1946, extending the said time to and including April 22, 1947; and an order dated April 15, 1947, extending the said time to and including April 22, 1948.

(20) The above-mentioned warrant of attachment in the action entitled "John F. McCarthy, Plaintiff, against Reichsbank, Defendant," has never been vacated or modified, nor has the attachment thereunder been released or otherwise discharged.

[fol. 40] (21) Section 917 of the New York Civil Practice Act, as in effect on December 11, 1941 and at all times since that date, after providing for levy under a warrant of attachment where the property levied on consists of a demand (with exceptions not here pertinent) by leaving a certified copy of the warrant with the person against whom the demand exists, provides that

"And such person so served with a certified copy of a warrant of attachment is forbidden to make or suffer, any transfer or other disposition of, or interfere with, any such property or interest therein so levied upon, or pay over or otherwise dispose of any debt so levied upon, or sell, assign or transfer any right so levied upon, to any person, or persons, other than the sheriff serving the said warrant until ninety days from the date of such service, except upon direction of the sheriff or pursuant to an order of the court."

(22) Section 922 of the New York Civil Practice Act, as in effect on December 11, 1941 and at all times thereafter until September 1, 1945, provided:

"* * * 1. In the event that the person owing any debt to the defendant, or holding property, effects or things in action of the defendant or interest therein subject to attachment, on which a levy under a warrant has been made, as in this act provided, shall fail or refuse to deliver such personal property attached, or to pay or assign to the sheriff the said debt, effect or thing in action, or interest therein the sheriff may, and if indemnified by the plaintiff as hereinafter provided, must, within ninety days after the service of the certified copy of the warrant on such person commence an action or special proceeding to reduce to his actual custody [fol. 41] all such personal property capable of manual delivery, and to collect, receive and enforce all debts, effects and things in action attached by him, and may maintain any such action or special proceeding in his name or in the name of the defendant for that purpose. * * *

"The time within which such action or special proceeding, as hereinbefore provided, may be commenced shall be extended beyond the period of ninety days from the date of the service of the said warrant only by order of the court for good cause shown. Such an order may be granted upon *ex parte* application of plaintiff. An order thus extending the time within which such an action or special proceeding may be commenced shall be effective to continue all duties and liabilities of any person on whom a warrant of attachment in the action has been served, provided that a certified copy of the said order is, prior to the expiration of the said ninety days, served upon said person."

Effective September 1, 1945, the above quoted provisions were amended by a change in the final sentence quoted so that the sentence would read:

"An order thus extending the time within which such an action or special proceeding may be com-

menced shall be effective to continue all duties and liabilities of any person on whom a warrant of attachment in the action has been served, provided that a certified copy of the said order is served upon said person prior to the expiration of the said ninety days, or prior to the expiration of the time [fol. 42] for commencing such an action or special proceeding as further extended."

The purpose and effect of the above amendment was to codify the previous court interpretation of the statute. As thus amended the above-quoted provisions have been in effect at all times since September 1, 1945.

(23) Transfer of funds contrary to Section 917 of the New York Civil Practice Act constitutes under the law of New York a civil contempt of court punishable accordingly. Under Section 753 of the Judiciary Law such a civil contempt may be punished by fine and imprisonment.

Second Defense

(24) Vesting Order Nos. 7792 and 7870 as presently attempted to be applied are void as contrary to the provisions of the Trading with the Enemy Act and/or the executive orders, rules and regulations issued pursuant thereto.

Third Partial Defense

(25) Under date of December 14, 1939, the Chase for the account and risk of Reichsbank Direktorium agreed with the Irving Trust Company of New York to hold the said trust company harmless from any and all consequences arising from the payment of a draft of the said trust company without presentment of original and duplicate of the draft. In consideration of the said agreement the said trust company paid to the Chase, and the Chase credited to the deposit account in the name of Reichsbank Direktorium, \$2,211.70, the dollar equivalent of the said draft at the rate of 40c. The amount involved [fol. 43] in the said indemnity agreement is \$2,211.70. The duplicate of the item thus paid being still outstanding, the Irving Trust Company has declined to release the Chase from the said indemnity agreement and the obligation of the Chase upon the same is still in effect.

(26) The Deutsche Golddiskontbank is presently indebted to the Chase for custodian fees accruing, in respect of its custody account with the Chase, since January 1, 1942, the amount thereof accrued as of January 29, 1948, being \$152.01, and such fees accruing thereafter at the rate of \$25 per annum. The Chase asserts a lien against the property held by it for account of Deutsche Golddiskontbank for such custodian fees.

Wherefore, the respondent, The Chase National Bank of the City of New York, prays that the order prayed for by the petitioner be denied and prays such other and further relief as the Court may deem just.

Timothy N. Pfeiffer, a Partner of Milbank, Tweed, Hope & Hadley, Attorneys for Respondent, The Chase National Bank of the City of New York, 15 Broad Street, New York 5, N. Y.

[fol. 44] EXHIBIT A ANNEXED TO RESPONSE

THE PEOPLE OF THE STATE OF NEW YORK, TO THE SHERIFF
OF ANY COUNTY OF NEW YORK STATE:

Whereas an application has been made to the undersigned by the plaintiff, Leo Zittman, for a warrant of attachment against the property of the defendant, Reichsbank, and the defendant, Deutsche Golddiskontbank, and a summons having been duly issued in this action, and the plaintiff having satisfactorily shown by the affidavits of Leo Zittman, duly verified the 11th day of December, 1941, and of Rudolphe G. Maron, duly verified the 10th day of December, 1941, that the action is brought to recover for a sum of money only, as damages, for unjust enrichment, that a cause of action therefor exists against the defendant, Reichsbank, and in favor of the plaintiff for the sum of \$68,940, with accrued interest thereon, that a cause of action therefor exists against the defendant, Deutsche Golddiskontbank, and in favor of the plaintiff for the sum of \$40,230, with accrued interest thereon, and that the plaintiff is entitled to recover said sums over and above all counterclaims known to him, and it being further satisfactorily shown by said affidavits that said

plaintiff is entitled to a warrant of attachment against the property of the defendants and each of them on the ground that the defendants are not residents of the State of New York, and the plaintiff having also given the undertaking required by law,

You are hereby commanded to attach and safely keep so much of the property within your County which the said defendant, Reichsbank, has or which it may have at any time before final judgment in this action as will satisfy the said plaintiff's demand of \$68,940, with accrued interest thereon and costs and expenses, and which the defendant, Deutsche Golddiskontbank, has or which it [fol. 45] may have at any time before final judgment in this action as will satisfy the said plaintiff's demand of \$40,230, with accrued interest thereon and costs and expenses, and that you proceed herein in the manner and make your return within the time required by law.

Witness, Hon. Charles J. Dodd, Justice of the Supreme Court of the State of New York, at the Court House, in the Borough of Brooklyn, City of New York, on the 11th day of December, 1941.

Hon. Charles J. Dodd, Justice of the Supreme Court of the State of New York.

Katz & Sommerich, Attorneys for Plaintiff, Office & P. O. Address, 120 Broadway, Borough of Manhattan, City of New York.

(Clerk's certificate omitted in printing.)

[fol. 46] EXHIBIT B ANNEXED TO RESPONSE

THE CHASE NATIONAL BANK

March 19, 1942.

1-23

Mr. John J. McCloskey, Jr., Sheriff of the City of New York, 31 Chambers Street, New York, N. Y.

Dear Sir:

SUPREME COURT : KINGS COUNTY

Leo Zittman, Plaintiff, vs. Reichsbank and Deutsche Golddiskontbank, Defendants.

The Chase National Bank of the City of New York hereby certifies, subject to corrections for errors or omissions, that at the time of the service of the Warrant of Attachment herein, upon it to wit on the 11th day of December, 1941 at 2:41 P. M. it held no property of nor was it indebted to the defendants, Reichsbank and Deutsche Golddiskontbank except:

- (a) There was a credit balance of \$40,401.12 in a deposit account in the name of the Reichsbank Direktorium.
- (b) It held as custodian for Deutsche Reichsbank Wertpapier, the securities set forth in the attached schedule and The Chase National Bank of the City of New York is not informed as to what interest, if any, the Reichsbank has in these securities and/or the proceeds thereof.

[fol. 47] (c) There was a credit balance of \$16,604.21 in a deposit account on its books in the name of Deutsche Golddiskontbank.

(d) It held as custodian for Deutsche Golddiskontbank the securities set forth in the attached schedule and the Chase National Bank of the City of New York is not informed as to what interest, if any, the Deutsche Golddiskontbank has in these securities and/or proceeds thereof.

The Chase National Bank of the City of New York hereby informs you that all of the aforementioned funds and securities are subject to Executive Order No. 8389 as

amended and to such other orders and decrees as may be applicable thereto.

The checks and/or drafts listed below on which payment was refused were received on a collection basis from the Reichsbank Direktorium:

Maker	Payee	Amount
Minister of Finance	President Reichspostz	
Lisbon, Portugal	entralamt Berlin	\$3,361.66
Philippine Trust Company,	Curt Georgi	25.40
Manila, P. I.		
Comptroller of Currency,	Rudolph Scheel	9.93
Washington, D. C.		
Alfred M. Feldshuh M. D.	Constance Feldshuh	86.18
Alfred M. Feldshuh M. D.	Alfred M. Feldshuh	39.90
Mary S. Halstead	Mary S. Halstead	3,828.96
D. Bouchez	Frau Barbara Dertwinkel	20.00
(name illegible)	Dresdner Bank Freiburg	75.00
William F. Wund, Special	W. Kuck & Martha Bubering	683.05
William F. Wund, Special	W. Kuck & Martha Bubering	752.53

[fol. 48] and these instruments are held by the Chase National Bank of the City of New York as Custodian for the Reichsbank Direktorium subject to Executive Order No. 8389 as amended and to such other orders and decrees as may be applicable thereto.

Yours very truly, John Prentice, Assistant Cashier.

RJB-GP.

EXHIBIT C ANNEXED TO RESPONSE

The People of the State of New York, to the Sheriff of the City of New York:

Whereas as application has been made to the undersigned by the plaintiff, John F. McCarthy, for a warrant of attachment against the property of the defendant, Reichsbank, and a summons having been duly issued in this action, and the plaintiff having satisfactorily shown by the affidavits of John F. McCarthy, duly verified the 20th day of January, 1942, and of Thomas H. Creighton, Jr., duly verified the 20th day of January, 1942, that the action is brought to recover a sum of money only for work, labor and services performed, and that a cause of action therefor exists against defendant and in favor of the plaintiff for the sum of \$24,810, with interest thereon from May 30, 1939, and that the plaintiff is entitled to recover said sum over and above all counter-

claims known to him, and it being further satisfactorily shown by said affidavits and the complaint that said plaintiff is entitled to a warrant of attachment against [fol. 49] the property of the defendant, on the ground that the defendant is a foreign corporation and not a resident of the State of New York, and the plaintiff having also given the undertaking required by law,

Now, you are hereby commanded to attach and safely keep so much of the property within your County which the said defendant Reichsbank has or which it may have at any time before final judgment in this action as will satisfy the said plaintiff's demand of \$24,810, with accrued interest thereon from May 30, 1939, and costs and expenses, and that you proceed herein in the manner and make your return within the time required by law.

Witness, Hon. Meier Steinbrink, a Justice of the Supreme Court of the State of New York, at the Court House, in the Borough of Brooklyn, City of New York, the 21st day of January, 1942.

Hon. Meier Steinbrink, Justice of the Supreme Court of the State of New York.

Katz & Sommerich, Attorneys for Plaintiff, Office & P. O. Address, 120 Broadway, Borough of Manhattan, City of New York.

(Clerk's certificate omitted in printing.)

[fol. 50] EXHIBIT D ANNEXED TO RESPONSE

THE CHASE NATIONAL BANK

April 21, 1942

1-23

Mr. John J. McCloskey, Jr., Sheriff of the City of New York, 31 Chambers Street, New York, N. Y.

Dear Sir:

SUPREME COURT : KINGS COUNTY

John F. McCarthy, Plaintiff, vs. Reichsbank, Defendant.
The Chase National Bank of the City of New York hereby certifies subject to corrections for errors or omis-

sions that at the time of the service of the Warrant of Attachment herein, upon it to wit on the 16th day of April, 1942 at 1:10 P. M. it held no property of nor was it indebted to the Defendant, Reichsbank, except:

- (a) There was a credit balance of \$40,592.71 in a deposit account in the name of the Reichsbank Direktorium.
- (b) It held as custodian for Deutsche Reichsbank Wertpapier the securities set forth in the attached photostatic schedule and The Chase National Bank of the City of New York is not informed as to what interest, if any, the Reichsbank has in these securities and/or the proceeds thereof.

[fol. 51] The Chase National Bank of the City of New York hereby informs you that all of the aforementioned funds and securities are subject to Executive Order No. 8389 as amended and to such other orders and decrees as may be applicable thereto.

The checks and/or drafts listed below on which payment was refused were received on a collection basis from the Reichsbank Direktorium;

Maker	Payee	Amount
Minister of Finance	President Reichspostz	
Lisbon, Portugal	entralamt Berlin	\$3,361.66
Philippine Trust Company,	Curt Georgi	25.40
Manila, P. I.		
Comptroller of Currency,	Rudolph Scheel	9.93
Washington, D. C.		
Alfred M. Feldshuh M. D.	Constance Feldshuh	86.18
Alfred M. Feldshuh M. D.	Alfred M. Feldshuh	39.90
Mary S. Halstead	Mary S. Halstead	3,828.96
D. Bouchez	Frau Barbara Dertwinkel	20.00
(name illegible)	Dresdner Bank Freiburg	75.00
William F. Wund, Special	W. Kuck & Martha Buberger	683.05
William F. Wund, Special	W. Kuck & Martha Buberger	752.53

and these instruments are held by The Chase National Bank of the City of New York as Custodian for the Reichsbank Direktorium subject to Executive Order No. 8389 as amended and to such other orders and decrees as may be applicable thereto.

The Chase National Bank of the City of New York hereby informs you that heretofore and on the 11th day

[fol. 52] of December, 1941 there was served upon it a Warrant of Attachment in an action entitled

Supreme Court; Kings County

LEO ZITTMAN, Plaintiff,

vs.

REICHSBANK and DEUTSCHE GOLDBANK, Defendants
Yours very truly, John Prentice, Assistant Cashier.

RJB-GP.

[fol. 53] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

ANSWER OF RESPONDENT JOHN F. MCCARTHY

The respondent, John F. McCarthy, answering the petition herein:

1. Admits the allegations contained in the paragraphs thereof numbered 1-3 inclusive, 5 and 12-17 inclusive.

2. Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 thereof.

3. Admits the allegations contained in paragraph 6 thereof that (a) for some time prior to June 14, 1941 the Deutsche Reichsbank, the central bank of Germany, a non-resident of the State of New York, maintained a dollar checking account entitled "Reichsbank-Directorium" with respondent, Chase National Bank; (b) on June 14, 1941, with the application of the "freezing" controls of Executive Order No. 8389 to nationals of Germany by Executive Order No. 8785 this checking account was "blocked" and all transactions relating thereto were prohibited, except as authorized by the Secretary of the Treasury, and (c) on June 14, 1941 the balance in the account totalled \$139,000.00; on December 11, 1941 \$40,401.12, and on April 16, 1942, \$40,592.71, and, except as expressly admitted herein, denies each and every other allegation contained in said paragraph.

4. Admits the allegations contained in paragraph 7 thereof that (a) for some time prior to June 14, 1941, the Deutsche Golddiskontbank, a non-resident of the State of New York, maintained a dollar checking account with respondent, Chase National Bank; (b) on June 14, 1941, [fol. 54] with the application of the "freezing" controls of Executive Order No. 8389 to Nationals of Germany by Executive Order No. 8785, this checking account was similarly "blocked" and all transactions other than the transfer of an interest in the account were prohibited, except as authorized by the Secretary of the Treasury, and (c) on June 14, 1941 the balance in this account totalled \$17,132.00 and on December 11, 1941, \$16,604.21 and, except as expressly admitted herein, denies each and every other allegation contained in said paragraph.

5. Admits the allegations contained in paragraph 8 thereof that (a) on or about December 11, 1941, respondent Leo Zittman commenced an action in the Supreme Court of the State of New York, Kings County, against Deutsche Reichsbank and Deutsche Golddiskontbank (action No. 16183 1941); (b) pursuant to a warrant of attachment procured by respondent Zittman, the Sheriff of the County of New York, then Daniel E. Finn, Jr., on or about December 11, 1941 levied upon said accounts of Deutsche Reichsbank and Deutsche Golddiskontbank by serving certified copies of warrants of attachment upon the respondent Chase National Bank and (c) thereafter, following the service by publication and mailing of the summons in said action, judgments by default for \$94,609.37 against Reichsbank and for \$56,023.21 against Golddiskontbank were entered both in favor of respondent Zittman, and, except as expressly admitted herein, denies each and every other allegation contained in said paragraph.

6. Admits the allegations contained in paragraph 9 thereof that licenses were never obtained authorizing respondent Chase National Bank to pay the said judgments out of either of the respective "blocked" accounts and that to date no execution has been had on the judgments, [fol. 55] and, except as expressly admitted herein, denies each and every other allegation contained in said paragraph.

7. Admits the allegations contained in paragraph 10 thereof that (a) on or about January 20, 1942, respondent John F. McCarthy commenced an action in the Supreme Court of the State of New York, Kings County, against Deutsche Reichsbank (action No. 719-1942); (b) pursuant to a warrant of attachment procured by respondent McCarthy, the Sheriff of the City of New York, respondent John J. McCloskey, Jr., on or about January 21, 1942 levied upon the said account of Deutsche Reichsbank by serving a certified copy of a warrant of attachment upon the respondent Chase National Bank, and (c) following the service by publication and mailing of the summons in said action on April 24, 1942 a judgment against Deutsche Reichsbank by default for \$29,660.21 was entered in favor of respondent McCarthy, and, except as expressly admitted herein, denies each and every other allegation contained in said paragraph.

8. Admits the allegations contained in paragraph 11 thereof that (a) on May 29, 1942, the Foreign Funds Control of the United States Treasury Department denied Application No. NY-401383 of respondent McCarthy for a license authorizing respondent Chase National Bank to pay said judgment out of the said "blocked" account, and (b) a license was never obtained authorizing respondent Chase National Bank to pay the said judgment out of the said "blocked" account and to date no execution has been had on the judgment, and except as expressly admitted herein, denies each and every other allegation contained in said paragraph.

[fol. 56]

First Defense

9. In the action commenced by the respondent McCarthy, a resident citizen of the United States, as plaintiff, against Reichsbank, as defendant, in the New York Supreme Court, Kings County, by the filing of the summons and complaint therein in the office of the Clerk of Kings County, New York, on January 21, 1942, McCarthy, as assignee, sought to recover the sum of \$24,810.00 with interest thereon from May 30, 1939 for legal work, labor and services rendered the said Reichsbank at its special instance and request by Frank W. Mondell, who was a member of the 54th (1895-97) and 56th to 67th Congresses (1899-1923), majority floor leader in the 66th and 67th Congresses and Director of the War Finance Corporation

(1923-1925) and who died on or about August 6, 1939, a resident of the District of Columbia, leaving a Last Will and Testament which was duly probated by the United States District Court for the District of Columbia and upon which Letters of Administration with the Will annexed were duly issued and granted by the said United States District Court to William H. Mondell, appointing him Administrator with the will annexed of the goods, chattels and credits which were of said Frank W. Mondell, and said William H. Mondell, who thereupon duly qualified and acted as such Administrator with the Will annexed, duly assigned said claim against the Reichsbank to the respondent McCarthy.

10. In said action a warrant of attachment was duly issued on January 21, 1942 to the Sheriff of the City of New York who, pursuant to the direction contained in said warrant, levied upon the accounts of the Reichsbank with the Chase National Bank, among others, by serving a certified copy of said warrant of attachment upon said Chase National Bank, and upon February 17, 1942, the [fol. 57] New York Supreme Court, Kings County, made an order directing service of the summons in said action upon Reichsbank by publication, which order further provided that the mailing of a copy of the summons and complaint and said order for service of summons by publication and the notice required by Rule 52 of the New York Rules of Civil Practice to said Reichsbank as required by Rule 50 of said Rules be dispensed with and that a copy of each thereof be mailed to the Attorney General of the United States on behalf of said Reichsbank.

11. On February 17, 1942 the United States was at war with Germany, and said Reichsbank was a foreign corporation having its office in, and it was a national of, Germany, and Rule 50 of the New York Rules of Civil Practice then provided that in such case the order of the Court for service of the summons by publication may dispense with the mailing of any papers to the defendant and, in lieu thereof, shall direct that the papers be mailed to such officer as may have been appointed by the President of the United States to take possession of the property of alien enemies directed to him at Washington, District of Columbia, on behalf of such defendant.

12. The officer contemplated by said Rule 50 as it ex-

isted prior to its amendment on March 16, 1942 was the officer whom the President was authorized to appoint pursuant to Section 6 of the Trading with the Enemy Act of October 6, 1917 (40 Stat. 415; U. S. Code, Title 50 Appendix, Section. 6) and by said statute the President was authorized to appoint an official to be known as the Alien Property Custodian with power to receive all money and property in the United States due or belonging to any enemy or ally of an enemy which may be paid, conveyed, transferred, assigned or delivered to said Custodian under the provisions of said act.

[fol. 58] 13. By an Executive Order No. 6894 made and issued by the President on May 1, 1934 which became effective on July 1, 1934, the office of the Alien Property Custodian was abolished and ceased to exist and all the authority, rights, privileges, powers and duties conferred and imposed on said official by law were transferred to the Department of Justice to be administered under the supervision of the Attorney General and said Executive Order was in full force and effect on February 17, 1942 when the order for publication of the summons in said action of the respondent McCarthy against Reichsbank was issued.

14. Publication of the summons in said action was made in accordance with the terms of said order for service by publication, dated February 17, 1942 and copies of the summons and complaint in said action, the order for service of the summons by publication and notice required by Rule 52 of the New York Rules of Civil Practice were mailed on February 18, 1942 addressed to the Attorney General of the United States, at Washington, D. C., and under date of February 25, 1942, the Attorney General of the United States acknowledged receipt thereof.

15. The Attorney General of the United States made no appearance and took no steps in said action and permitted judgment to be taken and entered therein in favor of respondent McCarthy against Reichsbank on April 24, 1942 for \$29,660.21, and by reason thereof the then Attorney General of the United States acquiesced in the taking and entry of said judgment and consented thereto.

Second Defense

16. Repeats and reiterates each and every allegation contained in paragraphs hereof numbered 8-14 inclusive with the same force and effect as if fully set forth at length herein.

[fol. 59] 17. The acquiescence in the taking and entry of said judgment and consent thereto of the then Attorney General of the United States is binding upon the petitioner herein, and by reason thereof petitioner is estopped from questioning the validity of the proceedings in said action of McCarthy against Reichsbank in the New York Supreme Court, Kings County, and the judgment entered therein.

Third Defense

18. From the inception of the "freezing" control, and on January 21, 1942 when the warrant of attachment was issued in the aforesaid action of McCarthy against Reichsbank and the levy made thereunder upon the accounts of the Reichsbank with the Chase National Bank, the commencement of actions in the courts of the United States or any of the States against blocked nationals and the issuance of warrants of attachment against funds belonging to blocked nationals and levied thereunder were authorized by the United States Treasury Department, which was empowered by Executive Order No. 8389, as amended, to administer the "freezing" control thereunder, and said Treasury Department merely required that a license be secured before payment to satisfy any judgment could be made from any blocked account affected by said Executive Order, and by reason thereof the commencement of the aforesaid action of McCarthy against Reichsbank, the issuance of the warrant of attachment therein and levy made thereunder on January 21, 1942, were authorized by the United States Treasury Department.

Fourth Defense

19. Repeats and reiterates each and every allegation contained in paragraph 18 hereof with the same force and effect as if fully set forth at length herein.

[fol. 60] 20. Said authorization of the United States Treasury Department is binding upon the petitioner herein and by reason thereof petitioner is estopped from question-

ing the validity of the proceedings in said action of McCarthy against Reichsbank in the New York Supreme Court, Kings County, and the judgment entered therein.

Fifth Defense

21. General Ruling No. 12 issued on April 21, 1942 by the Secretary of the Treasury in connection with the administration of the "freezing" control under Executive Order No. 8389, as amended, acted as a license validating the issuance of the warrant of attachment in the aforesaid action of McCarthy against Reichsbank, the levy made thereunder upon the accounts of the Reichsbank with the Chase National Bank of New York on January 21, 1942, the judgment recovered by the respondent McCarthy in said action against the Reichsbank on April 24, 1942, and the transfer thereby to the respondent McCarthy of the attributes of property interest in said accounts except payment.

Sixth Defense

22. Repeats and reiterates each and every allegation contained in paragraph 21 hereof with the same force and effect as if fully set forth at length herein.

23. Said General Ruling No. 12 is binding upon the petitioner herein and by reason thereof petitioner is estopped from questioning the validity of the proceedings in said action of McCarthy against Reichsbank in the New York Supreme Court, Kings County, and the judgment entered therein.

[fol. 61]

Seventh Defense

24. Under the laws of the State of New York a lien for the security of his demand against the Reichsbank was created in favor of the respondent McCarthy upon the accounts of the Reichsbank with the Chase National Bank on January 21, 1942, when the levy was made under the warrant of attachment issued by the New York Supreme Court, Kings County, and the rights or interest, if any, of the petitioner in said accounts by virtue of and under Vesting Order No. 7792 are subject to said attachment and said lien.

Eighth Defense

25. The service of a certified copy of the warrant of attachment issued by the New York Supreme Court, Kings County, in the action of McCarthy against Reichsbank by the Sheriff of the City of New York on January 21, 1942 on the respondent Chase National Bank made the accounts of the Reichsbank with the Chase National Bank the subject of that litigation and brought said accounts under the jurisdiction and control of the New York Supreme Court, Kings County, and the United States District Courts have no jurisdiction to interfere with or nullify said jurisdiction and control of said property by the New York Supreme Court, Kings County.

Ninth Defense

26. The action in the New York Supreme Court, Kings County, instituted by the respondent McCarthy against Reichsbank, was a proceeding *in rem* and subjected the accounts of the Reichsbank with the respondent Chase National Bank, which were levied upon and attached by the Sheriff of the City of New York on January 21, 1942, [fol. 62] to the payment of the judgment recovered by the respondent McCarthy in said action against the Reichsbank on April 24, 1942 with interest.

Tenth Defense

27. The judgment entered on April 24, 1942 in favor of the respondent McCarthy against the Reichsbank in the action in the New York Supreme Court, Kings County, is a judgment *in rem* and is binding upon all the world, including the petitioner herein, with respect to the accounts of the Reichsbank with the Chase National Bank levied upon on January 21, 1942 by the Sheriff of the City of New York, by the service of a certified copy of the warrant of attachment issued in that action.

Eleventh Defense

28. Respondent McCarthy is a citizen of the United States and is entitled under Section 8 of the Trading with the Enemy Act (40 Stat. 418; United States Code, Title 50, Appendix, Section 8) to continue to have his lien for

the security of his judgment against the Reichsbank created in his favor upon the accounts of the Reichsbank with the Chase National Bank on January 21, 1942 by the service by the Sheriff of the City of New York of a certified copy of the warrant of attachment issued in the action in the New York Supreme Court, Kings County, and to enforce said lien, realize thereon, and satisfy the judgment recovered by him against the Reichsbank out of the said attached accounts.

Twelfth Defense

29. The service by the Sheriff of the City of New York upon the Chase National Bank on January 21, 1942, of [fol. 63] a certified copy of the warrant of attachment issued by the New York Supreme Court, Kings County, in the action in that Court of the respondent McCarthy against Reichsbank enjoined and forbade the Chase National Bank to make or suffer any transfer or other disposition of or interfere with the accounts of the Reichsbank with the Chase National Bank so levied upon to any person or persons, including the petitioner herein, other than the said Sheriff, except upon the direction of the said Sheriff, or pursuant to an order of the New York Supreme Court, and such injunction is still in full force and effect.

Thirteenth Defense

30. The Treasury Department has in the administration of the "freezing" control under Executive Order 8389, as amended, recognized attachments as valid and creating liens upon blocked accounts without first procuring a particular license therefor by issuing licenses after recovery of judgment authorizing payment out of the attached accounts in satisfaction of the judgment.

31. That such practice of the Treasury Department is binding upon the petitioner herein and by reason thereof, petitioner is estopped from questioning the validity of the proceedings in said action of McCarthy against Reichsbank in the New York Supreme Court, Kings County, and the judgment entered therein.

Fourteenth Defense

32. Upon information and belief, that since the inception of the "freezing" control the Alien Property Custodian has recognized the validity of an attachment against blocked accounts of an enemy of the United States and the prior right of property therein of the judgment creditor by payment of the judgment out of the enemy judgment debtor's assets taken over by the Alien Property Custodian under a Vesting Order notwithstanding the judgment creditor had not procured a particular license authorizing the attachment and entry of judgment since the inception of the "freezing" control, and by reason thereof the petitioner herein is estopped from questioning the validity of the proceedings in said action in McCarthy against Reichsbank in the New York Supreme Court, Kings County, the judgment entered therein and the prior right of property of McCarthy in the attached accounts of the Reichsbank with the Chase National Bank.

Wherefore, the respondent McCarthy prays that the petition herein be dismissed, together with the costs and disbursements of this action.

Katz & Sommerich, By Henry I. Fillman, a member of the firm, Attorneys for respondent, John F. McCarthy, Office and Post Office Address, 120 Broadway, New York 5, N. Y.

(Verified by John F. McCarthy, Feb. 5, 1948.)

[fol. 65] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

ANSWER OF RESPONDENT LEO ZITTMAN

The respondent, Leo Zittman, for his response to the Order to Show Cause herein, dated January 23, 1948, and for his answer to the petition herein, on information and belief,

1. Admits the allegations of fact contained in the paragraphs of the petition herein, numbered 1 to 5 inclusive, 9, 10 and 12 to 17, inclusive.

2. Alleges that he is without knowledge or information sufficient to form a belief as to each and every allegation

contained in the paragraph of the petition herein, numbered 11.

3. Admits the allegations contained in the paragraph of the petition herein, numbered 6, except that this respondent denies that application of the "freezing" Controls of Executive Order No. 8389 as extended by Executive Order No. 8785, proscribed the transfer of any interest in the account therein described, maintained with the respondent, Chase National Bank, or in the funds represented thereby and denies that all transactions relating thereto were prohibited except as specifically authorized by the Secretary of the Treasury.

4. Admits the allegations contained in the paragraph of the petition herein, numbered 7, except that this respondent denies that application of the "freezing" Controls of Executive Order No. 8389, as extended by Executive Order No. 8785, prohibited the transfer of any interest in the account therein described, maintained with the respondent, Chase National Bank, or any or all other [fol. 66] transactions relating thereto, except as specifically authorized by the Secretary of the Treasury.

5. Admits the allegations contained in the paragraph of the petition herein, numbered 8, except that this respondent alleges that the action commenced by him in the Supreme Court of the State of New York, Kings County, against Deutsche Reichsbank and Deutsche Golddiskontbank, defendants (action No. 16183-1941), was begun on December 11, 1947, and on no other day and that levies pursuant to the warrant of attachment procured by this respondent in said action, were duly made by the then Sheriff of the County of New York on the accounts maintained by the said defendants with the Chase National Bank on December 11, 1941, at 2:41 P. M.

By way of further defense to the petition herein, Respondent, Leo Zittman, says:

6. That, in the action begun by this respondent, a resident citizen of the United States, as plaintiff, against Reichsbank and Deutsche Golddiskontbank, as defendants (Cause No. 16183-1941), in the Supreme Court of the State of New York, Kings County, by the filing of the summons therein in the office of the Clerk of Kings County, New York, on December 11, 1941, this respondent sought to recover the sum of \$68,940 with interest thereon from

July 2, 1937, from the Reichsbank and the sum of \$40,230 with interest thereon from July 2, 1937, from Deutsche Golddiskontbank for unjust enrichment upon a cause of action therefor which arose on July 2, 1937, and that such action was brought for the benefit of a person within the United States not an enemy or ally of enemy of the United States.

7. That, in said action, a warrant of attachment was duly issued on December 11, 1941, to the Sheriff of the [fol. 67] County of New York who, pursuant to the direction contained in said warrant, levied upon the funds, credits and property of the Reichsbank and the Deutsche Golddiskontbank maintained with, and held by, the respondent, Chase National Bank, among others, by serving a certified copy of said warrant of attachment upon said Chase National Bank on December 11, 1941, at 2:41 o'clock P. M. and that, at the time of the service of the said warrant of attachment, the said Chase National Bank, as shown by its written certification to the said Sheriff, dated March 19, 1942, held property of, and was indebted to, the defendants in said action as follows:

(a) The said Chase National Bank was indebted to the said the Reichsbank to the extent of \$40,401.12 in a deposit account.

(b) The said Chase National Bank held as custodian for the Reichsbank certain securities as described in the said certification.

(c) The said Chase National Bank was indebted to the said Deutsche Golddiskontbank to the extent of \$16,604.21 in a deposit account.

(d) The said Chase National Bank held as custodian for the Deutsche Golddiskontbank certain securities as described in the said certification; and

that all of said funds, credits and property were received and held by the said Chase National Bank prior to the commencement of the War with Germany.

8. That, in said action and on December 31, 1941, the Supreme Court of the State of New York, Kings County, made an order directing service of the summons in said action upon Reichsbank and Golddiskontbank by publication, which order further provided that the mailing of a

copy of the summons and complaint and said order for [fol. 68] service of summons by publication and the notice required by Rule 52 of the New York Rules of Civil Practice to said Reichsbank and Deutsche Golddiskontbank as required by Rule 50 of said Rules be dispensed with and that a copy of each thereof be mailed to the Attorney General of the United States on behalf of said Reichsbank and said Deutsche Golddiskontbank; and that the said Reichsbank and said Deutsche Golddiskontbank were non-residents of the State of New York and were foreign corporations which had offices and places of business in, and were nationals of, Germany.

9. That publication of the summons in said action was made in accordance with the terms of said order for service by publication, dated December 31, 1941, and copies of the summons and complaint in said action, the order for service of the summons by publication and notice required by Rule 52 of the New York Rules of Civil Practice were duly and regularly mailed, addressed to the Attorney General of the United States, at Washington, D. C., and that the Attorney General of the United States acknowledged receipt thereof.

10. That the Attorney General of the United States made no appearance and took no steps in said action and, accordingly, judgment was taken and entered in said action, on March 27, 1942, in favor of this respondent against the Reichsbank for \$92,655.28 and against the Deutsche Golddiskontbank for \$54,069.12 and against Reichsbank and Deutsche Golddiskontbank, jointly and severally, for \$1,954.09, costs and disbursements as taxed; that the Attorney General acquiesced in the said action and proceedings and judgment had therein; and that such acquiescence is binding on the petitioner and he is estopped thereby.

11. That upon the service of the said warrants of attachment in said action upon the Chase National Bank, [fol. 69] the latter, by virtue of Section 917 of the New York Civil Practice Act, was "forbidden to make or suffer, any transfer or other disposition of, or interfere with any such property or interest therein so levied upon, or pay over or otherwise dispose of any debt so levied upon, or sell, assign or transfer any right so levied upon, to any person, or persons, other than the sheriff serving the said warrant until ninety days from the date of such service,

except upon direction of the sheriff or pursuant to an order of the Court," which injunction is still in full force and effect.

12. That transfer of attached funds or property contrary to Section 917 of the New York Civil Practice Act constitutes under the law of New York a civil contempt of court, punishable by fine and imprisonment, or either.

13. That, under Section 922 of the New York Civil Practice Act, the Sheriff may be required to commence, within ninety days of service of the certified copy of the warrant of attachment, an action or special proceeding to reduce to his actual custody the property attached, but such section further provides:

"The time within which such action or special proceeding, as hereinbefore provided, may be commenced shall be extended beyond the period of ninety days from the date of the service of the said warrant only by order of the court for good cause shown. * * * An order thus extending the time within which such an action or special proceeding may be commenced shall be effective to continue all duties and liabilities of any person on whom a warrant of attachment in the action has been served, provided that a certified copy of the said order is served upon said person prior to the expiration of the said ninety days, or prior to the expiration of the time for commencing such an action or special proceeding as further extended."

[fol. 70] 14. That, from time to time and in accordance with the provisions of Section 922 of the New York Civil Practice Act, orders have been duly and regularly made in said action by the Supreme Court of the State of New York, County of Kings, and have been duly and regularly entered and served as prescribed by Section 922 of the New York Civil Practice Act, extending the time within which the Sheriff of the City of New York might commence an action or special proceeding prescribed in said Section 922, to collect, receive and enforce the debts, effects, things in action and property attached by him and that, by an order so made by said Court and entered on January 27, 1948, and duly served on the Chase National Bank on January 29, 1948, such time has been so extended to March 11, 1949.

15. That the warrant of attachment in said action brought by this respondent has never been vacated or modified nor has the attachment thereunder been released, discharged or otherwise removed and that, by virtue of such attachment, this respondent has acquired a lien against, and an interest and property right in, the funds, credits and property so attached and is entitled to require the same to be applied to the satisfaction of the judgments obtained by this respondent in his said action against the Reichsbank and the Deutsche Golddiskontbank and that such lien, interest and property right of this respondent are prior and superior to the rights claimed by the petitioner in this action.

16. That, by virtue of the service of a certified copy of the warrant of attachment granted by the Supreme Court of the State of New York, County of Kings, in the said action brought by this respondent by the Sheriff of New York County on December 11, 1941, on the respondent, Chase National Bank, the said Supreme Court of the State of New York acquired sole and exclusive jurisdiction and [fol. 71] control of, and dominion over, the funds, credits and property attached and that the United States District Courts have no jurisdiction or power to adjudicate with respect to, interfere with, or exercise authority or control over such funds, credits or property or the jurisdiction and control of, and dominion over, the same acquired by and vested in the said Supreme Court of the State of New York.

17. That this respondent is a citizen of the United States and is entitled, under Section 8 of the Trading With The Enemy Act (40 Stat. 418; U. S. Code, Title 50, Appendix, Section 8) to continue to have and enjoy his lien and security right in the funds, credits and property of the Reichsbank and the Deutsche Golddiskontbank in the hands of the Chase National Bank which was effected by the service of the said certified copy of warrant of attachment on the Chase National Bank on December 11, 1941 and to enforce such lien and security right, realize thereon, and satisfy the said judgments recovered by him against the Reichsbank and the Deutsche Golddiskontbank out of the funds, credits and property so attached.

18. That the Treasury Department of the United States, in the administration of the "freezing" controls under

Executive Order 8389, as amended, has recognized, consented to, and acquiesced in, unlicensed attachments against, and other judicial seizure of, blocked accounts as valid and effective and as creating valid and enforceable liens against such accounts and has issued licenses authorizing payment out of such blocked accounts in satisfaction of judgments obtained in actions begun by or involving such attachment against, or other judicial seizure of, such blocked accounts and that, by reason thereof, petitioner is estopped from questioning the validity or effect of the proceedings had in the said action brought by this petitioner and the judgment entered therein.

[fol. 72] 19. That, since the inception of "freezing" controls the Alien Property Custodian has recognized and acquiesced in the validity of attachments against blocked accounts of enemies of the United States and of the lien and superior right of the attaching creditor by making payment of judgments secured in attachment proceedings out of the enemy judgment debtor's assets acquired by the Alien Property Custodian under a Vesting Order, notwithstanding that the attaching creditor had not procured a particular license authorizing the attachment and entry of judgment and, by reason thereof, petitioner herein is estopped from impugning the validity of the proceedings had in the said action brought by this respondent against the Reichsbank and the Deutsche Golddiskontbank in the Supreme Court of the State of New York, County of Kings, the judgment entered therein and the prior lien and interest secured by this petitioner in the attached funds, credits and property in the hands of the respondent, the Chase National Bank.

20. That the Treasury Department of the United States, which was empowered to administer the "freezing" control under Executive Order 8389, as amended, did, on December 11, 1941, and prior and subsequent thereto, authorize, acquiesce in and ratify the commencement of suits against blocked nationals and the attachment, or other judicial seizure of funds, credits and property belonging to blocked nationals; that, accordingly, the aforesaid action brought by this respondent against the Reichsbank and the Deutsche Golddiskontbank and the proceedings had therein were authorized, ratified and acquiesced in by the said Treasury Department; and that such authorization,

acquiescence and ratification are binding on the petitioner and he is estopped thereby.

[fol. 73] 21. That a lien against, and property interest in, the funds, credits and property of the Reichsbank and the Deutsche Golddiskontbank maintained with the Chase National Bank arose in favor of this respondent when the same were levied upon in the said action, pursuant to the warrant of attachment granted by the Supreme Court of the State of New York, County of Kings, and such lien and property interest are superior to the interest of the petitioner, if any, in said funds, credits and property and, accordingly, that this respondent is entitled to require that said funds, credits and property be applied to the satisfaction of his said judgment.

22. That the said judgment, entered in favor of this respondent on March 27, 1942, against the Reichsbank and the Deutsche Golddiskontbank in the said action in the Supreme Court of the State of New York, County of Kings, is a judgment *in rem* and is binding upon the said funds, credits and property levied upon, as aforesaid, on December 11, 1941, as against the whole world, including the petitioner.

23. That the order prayed for by the petitioner, if granted wholly or in part, would contravene and deny to this respondent rights guaranteed to him by the Constitution of the United States.

Wherefore, the respondent, Zittman, prays that the petition herein be dismissed.

Joseph M. Cohen, Attorney for Respondent, Leo Zittman, 36 West 44th Street, New York 18, N. Y.

(Verified by Joseph M. Cohen, Feb. 20, 1948.)

[fol. 74] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED ANSWER OF RESPONDENT JOHN J. McCLOSKEY

The respondent, John J. McCloskey, as Sheriff of the City of New York, for his amended answer to the petition herein respectfully alleges:

1. The respondent Sheriff of the City of New York adopts as his answer the allegations contained in the answers to the petition herein respectively submitted by the respondents Leo Zittman and John F. McCarthy, said allegations being incorporated herein by reference with the same force and effect as if fully set forth at length herein.

Wherefore, the respondent Sheriff of the City of New York prays:

1. That the petition herein be dismissed;

2. That if the Court determines that the petitioner is entitled to possession of the property attached by the Sheriff pursuant to the Zittman and McCarthy attachments, any decree to be entered thereon should provide for the payment of the Sheriff's statutory poundage fees arising from said attachments and for such other and further relief as the Court may deem just.

Sidney Posner, Attorney for Respondent John J. McCloskey, as Sheriff of the City of New York,
Office and P. O. Address, 31 Chambers Street, New York 7, N. Y.

(Verified by H. William Kehl, Undersheriff, Feb. 27, 1948.)

[fol. 75] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF TIMOTHY N. PFEIFFER IN RESPONSE TO PETITION
AND ORDER TO SHOW CAUSE

STATE OF NEW YORK,
County of New York, ss:

TIMOTHY N. PFEIFFER, being duly sworn, deposes and says:

1. I am a partner of Milbank, Tweed, Hope & Hadley, counsel for The Chase National Bank of the City of New York (hereinafter called the "Chase") in the above-entitled action, and make this affidavit in response to the petition of Tom Clark, Attorney General, and the order to show cause herein.

2. On information and belief, the accounts of Reichsbank Direktorium and Deutsche Golddiskontbank, to which Vesting Orders Nos. 7792 and 7870 (annexed to the petition of petitioner herein as Exhibits C and E, respectively), purported to relate, had as set forth in the annexed affidavit of John C. Prentice, Second Vice President of the Chase, previously been levied upon by service of certified copies of certain warrants of attachment in actions then pending in the Supreme Court of New York, County of Kings. In my opinion the said warrants were valid and effective at the time of the purported Vesting Orders.

3. Pursuant to Section 917 of the New York Civil Practice Act, a person served with such certified copy of warrant of attachment "is forbidden to make or suffer, any transfer or other disposition of, or interfere with, any such property or interest therein so levied upon, or pay over or otherwise dispose of any debt so levied upon, or sell, assign or transfer any right so levied upon, to any person, or persons, other than the sheriff serving the said warrant until ninety days from the date of such service, [fol. 76] except upon direction of the sheriff or pursuant to an order of the court."

4. Under Section 922 of the New York Civil Practice Act, the Sheriff may be required to commence, within ninety days of service of the certified copy of the warrant of at-

attachment, an action or special proceeding to reduce to his actual custody the property affected, but the section further provides:

"The time within which such action or special proceeding, as hereinbefore provided, may be commenced shall be extended beyond the period of ninety days from the date of the service of the said warrant only by order of the court for good cause shown. * * * An order thus extending the time within which such an action or special proceeding may be commenced shall be effective to continue all duties and liabilities of any person on whom a warrant of attachment in the action has been served, provided that a certified copy of the said order is served upon said person prior to the expiration of the said ninety days, or prior to the expiration of the time for commencing such an action or special proceeding as further extended."

5. Transfer of funds contrary to Section 917 of the New York Civil Practice Act constitutes under the law of New York a civil contempt of court punishable accordingly. Under Section 753 of the Judiciary Law, a civil contempt may be punished by fine and imprisonment, or either.

6. Complex questions of law are raised by the present proceeding directed at securing an order declaring that petitioner is entitled to transfer of the attached property, [fol. 77] without vacation of the warrants of attachment. Among these questions are (a) whether the Chase would not be liable upon transfer of the funds to the Attorney General of the United States for violation of the New York Statute and/or for contempt of the New York Court and its process, (b) the statutory authority, validity and constitutionality of the Vesting Orders as attempted to be applied herein, and their effect upon the prior attachments, (c) whether the Vesting Orders as here attempted to be applied were not contrary to Section 8 of the Trading with the Enemy Act, (d) whether the attachments are affected by Executive Order No. 8389, as amended, or any regulations and rulings thereunder; and if so, the validity, constitutionality and effect of the said order, regulations and rulings.

7. In addition, the petition herein presents the procedural question, whether the procedure by order to show cause and petition is proper or whether under the Rules of Civil Procedure this is an action required to be instituted by complaint.

8. The questions herein cannot be adequately prepared or presentation in the brief time before return of the show cause order.

Wherefore, the respondent, The Chase National Bank of the City of New York, prays:

- (1) That the order prayed for by petitioner be denied;
- (2) That the Court determined whether the procedure by petition and order to show cause is proper; and
- (3) That if the Court should determine that the procedure herein is proper, that the Court fix such date not before March 6, 1948, as may be proper for further hearing on the merits.

(Sworn to by Timothy N. Pfeiffer, Feb. 5, 1948.)

[fol. 78] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

AFFIDAVIT OF JOHN C. PRENTICE

STATE OF NEW YORK,
County of New York, ss:

John C. Prentice, being duly sworn, deposes and says:

1. I am a Second Vice President of The Chase National Bank of the City of New York (hereinafter called the "Chase") and am familiar with the facts hereinafter set forth.

2. On June 14, 1941, accounts were maintained by Reichsbank Direktorium and Deutsche Golddiskontbank with the Chase. Pursuant to and in accordance with the Regulations of April 10, 1940, as amended, issued under Executive Order No. 8389, as amended, the Chase duly made reports thereof to the Secretary of the Treasury.

3. On December 11, 1941, the Chase was served with a certified copy of a warrant of attachment in an action by Leo Zittman, Plaintiff v. Reichsbank and Deutsche Golddiskontbank, Defendants, the amounts claimed being \$68,940, with accrued interest, against the defendant Reichsbank, and \$40,230, with accrued interest, against defendant Deutsche Golddiskontbank. The certification to the Sheriff by the Chase, made March 19, 1942, showed that there was at the time of service of the warrant a credit balance of \$40,401.12 in a deposit account in the name of Reichsbank Direktorium, and a credit balance of \$16,604.21 in the deposit account in the name of Deutsche Golddiskontbank; that certain securities were held by the Chase as custodian for Deutsche Reichsbank Wertpapier, and certain securities were held by the Chase as custodian for Deutsche Gold-[fol. 79] diskontbank, but that the Chase was not informed of what interest Deutsche Reichsbank Wertpapiere or Deutsche Golddiskontbank had in the securities and/or the proceeds thereof held for the respective accounts; and that certain collection items on which payment had been refused were also held by the Chase as custodian for Reichsbank Direktorium. The Chase further reported that the above funds, securities and other instruments were held subject to Executive Order No. 8389, as amended.

4. The Chase has from time to time been duly served with certified copies of court orders in the above-mentioned action of Zittman v. Reichsbank and Deutsche Golddiskontbank, extending the time within which the Sheriff must commence an action or special proceeding to reduce to possession the property attached. The latest such order of which a certified copy has thus been served is dated January 27, 1948, and extends the aforesaid time within which the Sheriff must commence an action or special proceeding to and including March 11, 1949.

5. On April 16, 1942, the Chase was served with a certified copy of a warrant of attachment in an action by John F. McCarthy, Plaintiff v. Reichsbank, Defendant, the amount claimed being \$24,810, with interest from May 30, 1939. The certification of the Chase to the Sheriff, made April 21, 1942, showed that there was a credit balance in the deposit account in the name of Reichsbank Direktorium of \$40,592.71; that certain securities were held by the Chase as custodian for Deutsche Reichsbank Wert-

papier, but that the Chase was not informed of what interest Deutsche Reichsbank Wertpapier had in the securities and/or the proceeds thereof held for its account; and that certain collection items on which payment had been refused were also being held by the Chase as custodian for Reichsbank Direktorium. The Chase further reported that the above funds, securities and instruments were held sub-[fol. 80] ject to Executive Order No. 8389, as amended, and that there had previously been served upon the Chase a warrant of attachment in Zittman v. Reichsbank and Deutsche Golddiskontbank.

6. The Chase has from time to time been served with certified copies of court orders in the above-mentioned action of McCarthy v. Reichsbank, extending the time within which the Sheriff must commence an action or special proceeding to reduce to possession the property attached. The latest such order of which a certified copy has thus been served is dated April 15, 1947, and extends the aforesaid time within which the Sheriff must commence an action or special proceeding to and including April 22, 1948.

7. Under date of December 14, 1939, the Chase for the account and risk of Reichsbank Direktorium agreed with the Irving Trust Company of New York to hold the said trust company harmless from any and all consequences arising from the payment of a draft of the said trust company without presentment of original and duplicate of the draft. In consideration of the said agreement the said trust company paid to the Chase, and the Chase credited to the deposit account in the name of Reichsbank Direktorium, \$2,211.70, the dollar equivalent of the said draft at the rate of 40c. The amount involved in the said indemnity agreement is \$2,211.70. The duplicate of the item thus paid being still outstanding, the Irving Trust Company has declined to release the Chase from the said indemnity agreement and the obligation of the Chase upon the same is still in effect.

8. The Deutsche Gold-diskontbank is presently indebted to the Chase for custodian fees accruing, in respect of its custody account with the Chase, since January 1, 1942, the amount thereof accrued as of January 29, 1948 being [fol. 81] \$152.01, and such fees accruing thereafter at the rate of \$25 per annum. The Chase asserts a lien against

the property held by it for account of Deutsche Golddiskontbank for such custodian fees.

9. On or about November 18, 1946, the Chase received a letter from the Office of Alien Property dated November 18, 1946, as set forth in Exhibit F attached to petitioner's petition herein, together with a certified copy of Vesting Order No. 7870 dated October 14, 1946, as set forth in Exhibit E attached to petitioner's petition herein, purporting to vest that certain debt or other obligation owing to Deutsche Gold-diskontbank arising out of a dollar checking account entitled Deutsche Golddiskontbank and any and all rights to demand, enforce and collect the same. The effective date of the said Vesting Order under APC General Order 33 is November 18, 1946.

10. The Chase by letter dated November 26, 1946, as set forth in Exhibit H attached to petitioner's petition herein, informed the Office of Alien Property of the warrant of attachment relating to the said account, and stated that the matter of payment to the Attorney General of the United States was being held in abeyance pending receipt of a release of the outstanding warrant of attachment. The Chase has not refused to comply with the said Vesting Order No. 7870 other than by the said letter informing the Office of Alien Property of the prohibition by mandate of the New York court against transfer of the account or interest of Deutsche Golddiskontbank levied upon by such warrant of attachment.

11. During late 1946, the Chase received a letter from the Office of Alien Property, dated November 26, 1946, as set forth in Exhibit D attached to petitioner's petition herein, together with a certified copy of Vesting Order No. 7792 dated October 3, 1946, as set forth in Exhibit C attached to petitioner's petition herein, purporting to vest [fol. 82] property described in subparagraph 2(a) as that certain debt or other obligation owing to Deutsche Reichsbank arising out of a dollar checking account entitled Reichsbank Direktorium; property described in subparagraph 2(b) thereof as that certain debt or other obligation owing to Deutsche Reichsbank arising out of a dollar checking account entitled Deutsche Reichsbank, Westpapierabteilung [sic] FS 62971; and property described in subparagraph 2(c) thereof as that certain debt or other obligation owing to Deutsche Reichsbank arising out of a

dollar checking account entitled General Ruling No. 6 Account, Deutsche Reichsbank, Westpapierabteilung [sic] F 62971 and any and all rights to demand, enforce and collect the same. The effective date of the said Vesting Order under APC General Order 33 is October 9, 1946.

12. The Chase by letter dated August 13, 1947, as set forth in Exhibit G attached to petitioner's petition herein, informed the Office of Alien Property of the warrants of attachment relative to the said accounts and stated that the matter of payment to the Attorney General of the United States was being held in abeyance pending receipt of a release of the outstanding warrants of attachment. The Chase further informed the said Office that the accounts mentioned in subparagraphs 2(b) and 2(c) of the Vesting Order were set up to handle the income from securities held in custody for Deutsche Reichsbank Wertpapier, said securities having been reported to the Sheriff in the return of the Chase. The Chase has not refused to comply with the said Vesting Order No. 7792 other than by the said letter informing the Office of Alien Property of the prohibition by mandate of the New York court against transfer of the accounts or interests of Reichsbank Direktorium levied upon by such warrant of attachment.

[fol. 83] 13. The Chase has never been served with any notice that the said warrant of attachment in *Zittman v. Reichsbank and Golddiskontbank* has been released, vacated or annulled or the attachment discharged.

14. The Chase has never been served with any notice that the said warrant of attachment in *McCarthy v. Reichsbank* has been released, vacated or annulled or the attachment discharged.

John C. Prentice,

(Sworn to by John C. Prentice, Feb. 5, 1948.)

[fol. 84] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

STIPULATION AS TO FACTS—March 16, 1948

It is hereby stipulated and agreed by and between the petitioner herein and the respondent The Chase National Bank of the City of New York, by their respective attor-

neys, that the following facts shall be taken as true, for the purpose of this proceeding only:

1. Under date of December 14, 1939, The Chase National Bank of the City of New York (hereinafter called the Chase) for the account and risk of Reichsbank Direktorium agreed with the Irving Trust Company of New York to hold the said trust company harmless from any and all consequences arising from the payment of a draft of the said trust company without presentment of original and duplicate of the draft. In consideration of the said agreement the said trust company paid to the Chase, and the Chase credited to the deposit account in the name of Reichsbank Direktorium, \$2,211.70, the dollar equivalent of the said draft at the rate of 40c. The amount involved in the said indemnity agreement is \$2,211.70. The duplicate of the item thus paid being still outstanding, the Irving Trust Company has declined to release the Chase from the said indemnity agreement and the obligation of the Chase upon the same is still in effect.

2. The Deutsche Golddiskontbank is presently indebted to the Chase for custodian fees accruing, in respect of its custody account with the Chase, since January 1, 1942, [fol. 85] the amount thereof accrued as of January 29, 1948 being \$152.01, and such fees accruing thereafter at the rate of \$25 per annum.

Dated: New York, N. Y., March 16, 1948.

John F. X. McGohey, United States Attorney for the Southern District of New York, By Laurence H. Axman, Assistant United States Attorney, Attorney for Petitioner.

Milbank, Tweed, Hope & Hadley, By Timothy N. Pfeiffer, A Partner, Attorneys for Respondent, The Chase National Bank of the City of New York.

[fol. 86] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

TOM C. CLARK, Attorney General, as successor to the Alien
Property Custodian, Petitioner,

v.

FEDERAL RESERVE BANK OF NEW YORK, ET AL., Respondents.

TOM C. CLARK, Attorney General, as successor to the Alien
Property Custodian, Petitioner,

v.

CHASE NATIONAL BANK OF THE CITY OF NEW YORK, ET AL.,
Respondents.

STIPULATION

For the purposes of these causes, it is hereby Stipulated and Agreed as follows by and among the parties hereto, through their attorneys, subject to any objection with respect to materiality or relevancy which may hereafter be made by any party:

1. The motions of the respondent McCarthy for an order striking from the motion calendar petitioner's applications for relief and directing that any and all further proceedings herein proceed in accordance with the procedure laid down in the Federal Rules of Civil Procedure be and the same hereby are withdrawn.

[fol. 87] 2. The following document, a photostatic copy of which is attached to this stipulation and marked Exhibit "A," is genuine, and the facts stated therein are true:

Letter, dated February 25, 1942, from the Attorney General of the United States, signed for him by Francis J. McNamara, Special Assistant to the Attorney General, Alien Property Division, addressed to Messrs. Katz & Sommerich.

3. On January 7, 1942 respondent Zittman caused to be mailed to the Attorney General of the United States at Washington, D. C. a copy of the summons and complaint

in the action brought by Zittman in the Supreme Court of the State of New York for the County of Kings against the Deutsche Reichsbank, and the Deutsche Golddiskontbank, together with the notice and the order for service of summons by publication made in such action required by Rule 52 of the New York Rules of Civil Practice to be mailed to the Attorney General. Thereafter the Attorney General acknowledged receipt of said papers:

4: The following letter was sent on June 14, 1941, by Mr. D. W. Bell, Acting Secretary of the Treasury, to Mr. Januss Zoltowski, Financial Counsellor to the Polish Embassy, 14 Wall Street, New York, N. Y., and that the statements made therein reflected the policy of the Treasury Department:

Treasury Department,
Washington, June 14, 1941

Re: Commission for Polish Relief, Ltd. v. Banca Națională A României.

Dear Sir: Reference is made to your conference on June 6, 1941, with representatives of this Department relative to the above case and Executive Order No. 8389, as amended.

[fol. 88] This will confirm the advice furnished to you at such conference that in administering Executive Order No. 8389, as amended, and the regulations issued thereunder, the Treasury Department does not attempt to limit the bringing of suits in the courts of the United States, or of any of the states. However, in no event may any payment be made from any blocked account affected by such Executive Order except pursuant to a license authorizing such action.

Very truly yours, D. W. Bell, Acting Secretary
of the Treasury.

Mr. Januss Zoltowski, Financial Counsellor to the
Polish Embassy, 14 Wall Street, New York, N. Y.

5. From the inception of "freezing" controls, all litigants who, prior to commencing attachment actions against funds belonging to blocked nationals, had requested the Secretary of the Treasury to license an attachment, or levy,

received from the Treasury Department a response of the following nature:

Under Executive Order No. 8389, as amended, and the Regulations issued thereunder, no attempt is made to limit the bringing of suits in the courts of the United States or of any of the States. However, should you secure a judgment against one of the parties referred to in your letter, which is a country covered by the Order, or a national thereof, a license would have to be secured before payment could be made from accounts in banking institutions within the United States in the name of such country or national.

[fol. 89] 6. From the inception of "freezing" controls, the Secretary of the Treasury in administering the "freezing" control program adopted the position, in response to numerous requests made of him, that the bringing of an action, the issuance of a warrant of attachment therein, and the levy thereunder upon blocked property found within the jurisdiction of the court which issued the warrant were not forbidden but that a license was required to be secured before payment could be made from the blocked account to satisfy any judgment recovered in such action.

7. The Treasury Department has at various times issued licenses authorizing payment out of a blocked account of a blocked national for the purpose of making payment on a judgment recovered in an action where a prior warrant of attachment was issued and levied upon the blocked account of a blocked national therein notwithstanding that a particular license to institute the action and levy the attachment was not procured by a plaintiff and judgment-creditor. A license to institute the action and levy the attachment was in fact not required by the Treasury Department.

8. Following a judgment obtained by one Metallo-Chemical Corporation against a blocked national in an action in a New York court where a warrant of attachment was issued and levied upon a blocked account without first procuring from the Treasury Department a license to institute the action and to procure and levy the warrant of attachment therein, the Treasury Department issued license No. NY704109-T, a copy of which is attached hereto and marked Exhibit "B."

9. On December 22, 1941, without license from the Treasury Department, a warrant of attachment was issued in an action in a New York court instituted by Murray Oil [fol. 90] Products Co., Inc. against Mitsui & Co. Ltd., the bank balances of Mitsui & Co. Ltd. with the National City Bank and Chase National Bank were attached pursuant to the warrant of attachment, and a judgment was thereafter entered in favor of Murray Oil Products Co. against the debtor Mitsui & Co. Ltd. A license authorizing the issuance of the attachment was in fact not required by the Treasury Department. After the then Alien Property Custodian had issued, on August 17, 1942 Vesting Order No. 105 vesting in himself title to all property and assets of Mitsui & Co. Ltd. in the United States, and after the judgment became final, the Alien Property Custodian paid to the judgment-creditor an amount sufficient to satisfy the judgment.

10. In the plenary action brought by the respondent Zittman in the Supreme Court of the State of New York for the County of Kings against the Deutsche Reichsbank and Deutsche Golddiskontbank, a certified copy of the warrant of attachment was served upon the Chase National Bank of the City of New York on December 11, 1941 at 2:41 o'clock P. M. Eastern Standard Time and on the Federal Reserve Bank of New York on December 11, 1941 at 2:20 o'clock P. M. Eastern Standard Time. The funds, credits and property against which said warrants of attachment were levied had been received and held by the respondents Chase National Bank and Federal Reserve Bank of New York prior to the commencement of the war with Germany.

11. The Attorney General of the United States did not appear and did not take any steps in the actions brought by respondents McCarthy and Zittman in the Supreme [fol. 91] Court of the State of New York for Kings County in which the warrants of attachment were issued.

Katz & Sommerich, Counsel for respondent McCarthy, By: Henry I. Fillman, Joseph M. Cohen, Counsel for respondent Zittman, John F. X. McGoley, United States Attorney, Counsel for Tom C. Clark, Attorney General, Petitioner, By: Laurence H. Axman, Assistant United States Attorney, Thomas E. Harris.

[fol. 92] EXHIBIT A, ANNEXED TO STIPULATION

Department of Justice, Washington, D. C. msm, February
25, 1942

Address reply to "The Attorney General" and refer to initials and number.

FJ. McN.:JYCJr., 9-100-017-268.

Messrs. Katz & Sommerich, 120 Broadway, New York, New York.

Sirs:

This Department has received the following papers in the case of John F. McCarthy, plaintiff, against Reichsbank, defendant, now pending in the Supreme Court, Kings County, New York:

- (1) Notice pursuant to Rule 52 of the Rules of Civil Practice of New York;
- (2) Summons;
- (3) Complaint;
- (4) Affidavit in support of application for order of publication, with exhibits; and
- (5) Order for service of summons by publication.

[fol. 93] These papers were enclosed without accompanying letter, in an envelope bearing your name and address, directed to the Attorney General of the United States.

Respectfully, For the Attorney General, Francis J. McNamara, Special Assistant to the Attorney General, Alien Property Division.

[fol. 94] EXHIBIT B, ANNEXED TO STIPULATION

License No. N. Y. 704109-T

Date: July 21, 1945

LICENSE (Granted under the authority of Executive Order No. 8389 of April 10, 1940, as amended, and the regulations and rulings issued thereunder).

To, Gunther Jacobson (G.J. 7), Name of Licensee, 36 West 44th Street, New York 18, New York, Address of Licensee.

Sirs:

1. Pursuant to your application of June 11, 1945, the following transaction is hereby licensed:

The Irving Trust Company, New York City is hereby authorized to charge the account of Banque Transatlantique in Paris, France, \$3,705.44, plus interest, and pay that amount to the Sheriff of the City of New York, pursuant to the judgment obtained by Metallo-Chemical Corporation against Banque Transatlantique in Paris, France, dated April 23, 1941 to pay out the above funds as follows:

- (1) To himself for fees;
- (2) Balance to a domestic bank for credit to the blocked account of Metallo-Chemical Corporation.

2. This license is granted upon the statements and representations made in your application, or otherwise filed with or made to the Treasury Department as a supplement to your application, and is subject to the conditions, [fol. 95] among others, that you will comply in all respects with Executive Order No. 8389 of April 10, 1940, as amended, the Regulations and Rulings issued thereunder and the terms of this license.

3. The licensee shall furnish and make available for inspection any relevant information, records or reports requested by the Secretary of the Treasury, the Federal Reserve Bank through which the license was issued, the Postmaster at the place of mailing or the Collector of Customs at the port of exportation.

4. This license expires 30 days from the date of its issuance, is not transferable, is subject to the provisions of Executive Order No. 8389 of April 10, 1940, as amended, and the Regulations and Rulings issued thereunder and may be revoked or modified at any time in the discretion of the Secretary of the Treasury acting directly or through the agency through which the license was issued, or any other agency designated by the Secretary of the Treasury. If this license was issued as a result of willful misrepresentation on the part of the applicant or his duly authorized agent, it may, in the discretion of the Secretary of the Treasury, be declared void from the date of its issuance, or from any other date.

Issued by direction and on behalf of the Secretary of the Treasury:

Federal Reserve Bank of New York By (Illegible).

The Act of October 6, 1917, as amended, provides in part as follows:

“ * * * Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule [fol. 96] or regulation issued thereunder, shall, upon conviction, be fined not more than \$10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment or both.”

Note: If this license covers gold in any form the provisions of the Provisional Regulations issued under the Gold Reserve Act of 1934 must also be complied with. Original.

[fol. 97] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

OPINION BY BONDY, D. J.—October 1, 1948

Honorable John F. X. McGohey, by Laurence H. Axman, Esq., Tom E. Harris, Esq., and Lewis Haffer, Esq., for Honorable Tom C. Clark, Attorney General.

Messrs. Milbank, Tweed, Hope & Hadley, by Timothy N. Pfeiffer, Esq., and Mrs. Rebecca M. Cutler, for The Chase National Bank of the City of New York.

Walter S. Logan, Esq., by Lyon Boston, Esq., for Federal Reserve Bank of New York.

Joséph M. Cohen, Esq., for Leo Zittman.

Sidney Posner, Esq., for John J. McCloskey, Jr., as Sheriff of the City of New York.

Messrs. Katz & Sommerich, by Henry I. Fillman, Esq., for John F. McCarthy.

BONDY, District Judge:

In one of the above entitled actions the Attorney General, as successor to the Alien Property Custodian, moves for a decree declaring that he is entitled to the possession of the balance remaining to the credit of the Deutsche Reichsbank on the books of the respondent Federal Reserve Bank of New York and in the other he moves for a decree declaring that respondents Zittman, McCarthy and McCloskey, as sheriff, did not obtain any lien or other interest in the Reichsbank-Direktorium or Deutsche Gold-diskontbank accounts on the books of the respondent Chase National Bank, and that the petitioner is entitled to the balances remaining in such accounts. Both proceedings [fol. 98] involve similar facts and similar questions of law. The motion papers disclose that there is not any dispute as to any of the material facts.

In December, 1941 Zittman brought an action in the Supreme Court of the State of New York, Kings County, as against the Deutsche Reichsbank and Deutsche Gold-diskontbank, German nationals, to recover money allegedly due him, and in January, 1942 McCarthy brought an action in the same court against the Deutsche Reichsbank to recover money allegedly due him. At the time of the commencement of these actions, the respondent McCloskey as

sheriff purported to levy on the balance due upon the accounts of the German banks in the respondent banks pursuant to attachments issued by the courts. The state courts ordered service of the summonses by publication, and judgments by default were entered in favor of Zittman on March 27, 1942 and in favor of McCarthy on April 24, 1942.

The accounts had been blocked under freezing controls of Executive Order No. 8389, 5 F. R. 1400, as extended to nationals of Germany by Executive Order No. 8785, 6 F. R. 2897, effective June 14, 1941, 12 U. S. C. A. Section 95a note. No license or other authorization for the payment of the judgments out of the blocked accounts was obtained and the respondent banks did not pay to the respondent sheriff any part of the balance due on the deposit accounts of the German banks.

On October 3, 1946 the Alien Property Custodian by an order vested in himself the indebtedness owing to the Reichsbank from the Chase Bank and on October 14, 1946 by an order vested in himself the indebtedness owing to the Golddiskontbank from the Chase Bank. Subsequent demands for payments of such indebtedness to the Custodian were refused by the Chase Bank unless the warrants of attachment issued in the actions brought by Zittman and McCarthy were released.

[fol. 99] On October 3, 1946 the Custodian by an order vested in himself the indebtedness owing to the Reichsbank from the Federal Reserve Bank. On demand the Federal Reserve Bank remitted to the Custodian the amount thereof less a sum withheld to cover the attachments in the Zittman and McCarthy actions.

By stipulation the objections to the procedure adopted by the Attorney General in these actions were withdrawn, and it was agreed that the Treasury Department from the inception of the freezing controls informed all litigants who, prior to the commencement of attachment actions against funds belonging to blocked nationals, had requested the Secretary of the Treasury to license an attachment that: "Under Executive Order No. 8389 as amended, and the Regulations issued thereunder, no attempt is made to limit the bringing of suits in the courts of the United States or of any of the States. However, should you secure a judgment against one of the parties referred to in your

letter, which is a country covered by the Order, or a national thereof, a license would have to be secured before payment could be made from accounts in banking institutions within the United States in the name of such country or national." It was also stipulated that the Treasury adopted the position that the bringing of an action, the issuance of a warrant of attachment therein and the levy thereunder upon blocked property found within the jurisdiction of the court which issued the warrant were not forbidden but that a license was required before payment could be made from the blocked account to satisfy any judgment recovered in such action, and that the Treasury Department has at various times issued a license authorizing payment out of a blocked account of a blocked national for the purpose of making payment on a judgment recovered in an action where a prior warrant of attachment was issued and levied upon the blocked account of a blocked national, notwithstanding that a license to institute the action and levy [fol. 100] the attachment was not procured by a plaintiff and judgment creditor, and further that a license to institute such action and levy the attachment was in fact not required by the Treasury Department and that the Attorney General did not appear and did not take any steps in the actions brought by respondents McCarthy and Zittman in the Supreme Court of the State of New York in which the warrants were issued, of which actions he was given notice in writing.

The respondents contend that the allegedly attached accounts are in the custody of the state court, that the petitioner seeks relief which would unlawfully interfere with that custody, that full faith and credit must be given to the state attachment proceedings, that the vesting of the property in the Custodian would result in the taking of property without due process of law and that accordingly the petitions must be dismissed.

Arguments similar to those urged in opposition to these motions were presented and considered in *Clark v. Proper*, 169 F. (2d) 324, affirming *Markham v. Taylor*, 70 F. Supp. 202. In that case the Circuit Court affirmed an order of Judge Cox granting a motion for summary judgment in an action seeking a declaration that a permanent receiver for an Austrian co-operative society had no title to or in-

terest in amounts owed to said society by an American association, notwithstanding that the receiver had been appointed to receive and reduce to his possession all the assets of the society by a New York State court judgment which, were it not for the fact that the accounts were blocked, would have vested all title to the property in the receiver, and notwithstanding that a suit brought by the receiver against the association to recover the sums allegedly due was pending in a New York State court. It was held that even if the subject matter of the controversy were in the custody of the state court, the federal court had jurisdiction to adjudicate the claim of the Custodian, *Markham v. Allen*, 326 U. S. 490, that Executive Order No. 8389, as amended, prohibiting the unlicensed transfer of an enemy alien's property, applies to transfers by judicial process, and that the Order was properly interpreted by Treasury Department General Ruling No. 12, April 21, 1942, 7 F. R. 2991, and by Treasury Department Public Circular No. 31, August 2, 1946, 11 F. R. 8351, both of which declare that judicial process cannot, without a license or other authorization from the Secretary, create any interest in blocked property. The court reached its conclusion even though it also was urged that the proceedings in the federal court constituted failure to accord full faith and credit to a judgment of the state court and that the vesting of the property in the Custodian would result in a taking of property without due process of law.

The court considers itself bound by that decision which expressly disagreed with the decision in *Singer v. Yokohama Specie Bank* 293 N. Y. 542, upon which respondents rely. *Polish Relief Comm. v. Banca Nationala A. Rumaniei*, 288 N. Y. 332, also relied on by respondents, states that Executive Order No. 8389 "must be taken to have deprived the defendant of power to transfer any interest in these blocked accounts except through the medium of assignment subject to a releasing of the credit by the Secretary of the Treasury." The United States as *amicus curiae* supported the attachment involved in that case as inoffensive to national policy. The United States however in the instant cases denies that any rights were acquired by virtue of the attachments. The fact that the Treasury Department advised prospective litigants that no license was necessary to bring suit and secure the issuance of a warrant of at-

attachment does not estop the petitioner from taking this position since it is consistent with General Ruling No. 12(4) [fol. 102] which specifically provides that while a transfer of blocked property shall be valid and enforceable for the purpose of determining for the parties to an action the rights and liabilities litigated, no attachment, judgment, or other judicial process shall confer any greater interest in any blocked property than the owner of such property could created by voluntary act prior to the issuance of a license.

Because the attachments by the sheriff did not transfer any right, title or interest in the blocked property, his application for payment of his fees by the Custodian must be denied.

The Chase National Bank claims the right to set off against the Custodian's claims a contingent liability on a guaranty made by it for the account of the Reichsbank to the Irving Trust Company against loss arising from the payment by said trust company of a draft without presentation of the original and duplicate. The guaranty of the Chase Bank to Irving Trust Company does not create any banker's lien or set-off to the claim of the Custodian to the assets of the Reichsbank. See *Clark v. Manufacturers Trust Company*, decided by the Court of Appeals for the Second Circuit, August 5, 1948.

The Chase Bank also claims custodian fees accruing in connection with the Golddiskontbank's custody account. The Attorney General having consented to the deduction of the fees without conceding that they are deductible as a matter of right, it becomes unnecessary for the court to pass upon the claim for the allowance.

The motions accordingly are granted subject to the allowance of custodian fees pursuant to the consent of the petitioner.

October 1, 1948.

/s/ Wm. Bondy, United States District Judge.

[fol. 103] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civ. 44-617

TOM C. CLARK, Attorney General, as Successor to the Alien Property Custodian, Petitioner,

v.

CHASE NATIONAL BANK OF THE CITY OF NEW YORK, and JOHN J. McCLOSKEY, JR., as Sheriff of the City of New York, and LEO ZITTMAN and JOHN F. MCCARTHY, Respondents

FINAL DECREE APPEALED FROM—January 13, 1949

This cause having come on for hearing on March 5 and March 17, 1948, before the Honorable William Bondy, District Judge, on order to show cause issued pursuant to the petition of Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, and the court having examined the pleadings, stipulations of fact and other papers on file and having heard the arguments of counsel and being otherwise fully advised and satisfied in premises and having rendered an opinion in writing dated October 1, 1948, now, therefore, it is Ordered, Adjudged, Decreed and Declared:

1. That by Virtue of Executive Order No. 8389, as amended, and regulations and rulings issued thereto the respondents Leo Zittman and John J. McCloskey, Jr., as sheriff of the City of New York, obtained no lien or other interest in or to any account maintained by Deutsche Reichsbank or by Deutsche Golddiskontbank with the respondent The Chase National Bank of the City of New [fol. 104] York nor in the funds represented thereby as a result of the issuance and levy of a warrant of attachment on December 11, 1941, in a cause entitled "*Zittman v. Deutsche Reichsbank and Deutsche Golddiskontbank*," No. 16183-1941, Supreme Court of New York, Kings County, nor by any service or levy of or under said warrant of attachment nor by any other proceedings in said cause; that by virtue of Executive Order No. 8389, as amended, and regulations and rulings issued thereto, the respondents John F. McCarthy and John J. McCloskey, Jr., as sheriff

of the City of New York, obtained no lien or other interest in or to said accounts nor in the funds represented thereby as a result of the issuance of a warrant of attachment on or about January 21, 1942 in a cause entitled "*McCarthy v. Deutsche Reichsbank*," No. 719-1942, Supreme Court of New York, Kings County, nor by any service or levy of or under said warrant of attachment nor by any other proceedings in said cause, and that none of the said respondents have any right, title or interest in or to said accounts.

2. That by virtue of Vesting Order No. 7792 the petitioner, Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, succeeded to all right, title and interest in and to that debt or other obligation owing on the effective date of said order to Deutsche Reichsbank by the respondent The Chase National Bank of the City of New York arising out of (a) a dollar checking account entitled Reichsbank Directorium, (b) a dollar checking account entitled Deutsche Reichsbank Wertpapierabteilung FS 62971 and (c) a dollar checking account entitled General Ruling No. 6 Account, Deutsche Reichsbank Wertpapierabteilung F62971, together with dividends and accumulations, if any, arising out of the said vested accounts.

[fol. 105] 3. That by virtue of Vesting Order No. 7870 the petitioner, Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, succeeded to all right, title and interest in and to that debt or other obligation owing on the effective date of said Order to Deutsche Golddiskontbank by respondent The Chase National Bank of the City of New York arising out of a dollar checking account entitled Deutsche Golddiskontbank, together with dividends and accumulations, if any, arising out of the said vested account.

4. That petitioner, Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, by virtue of the respective vesting order is entitled to the entire balance in the said accounts of Deutsche Reichsbank, as shown on the books of The Chase National Bank of the City of New York to have existed on the effective date of Vesting Order No. 7792, together with dividends and accumulations, if any, arising out of the said vested accounts, and to the entire balance in the said account of Deutsche Golddiskontbank, as shown on the books of The Chase National Bank of the City of New York to have existed on the effective

date of Vesting Order No. 7870, together with dividends and accumulations, if any, arising out of the said vested account, less the amounts due to the said Chase National Bank for custodian fees accruing up to the time when the balance in said account is paid to petitioner (the amount of such fees to January 29, 1948 being \$152.01 and said fees accruing thereafter at the rate of \$25 a year).

[fol. 106] 5. That the application of the respondent McCloskey, as Sheriff of the City of New York, for payment of fees be, and the same hereby is, denied.

6. That no costs shall be allowed to any party herein.

Dated: New York, N. Y., January 13th, 1949.

Wm. Bondy, U. S. D. J.

Judgment entered, William V. Connell, Clerk, Jan. 20, 1949.

[fol. 107] UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK

NOTICE OF APPEAL BY JOHN F. MCCARTHY—March 2, 1949

Sirs:

Notice is hereby given that John F. McCarthy, one of the respondents above-named, hereby appeals to the United States Court of Appeals for the Second Circuit, from the final decree dated January 13, 1949 and entered herein on January 20, 1949.

Dated, New York, N. Y., March 2, 1949.

Yours, etc., Katz & Sommerich, Attorneys for Respondent, John F. McCarthy, Office & P. O. Address: 120 Broadway, New York 5, N. Y.

[fol. 108] To: John F. X. McGohey, Esq., United States Attorney, Attorney for Petitioner, United States Courthouse, Foley Square, New York, N. Y.

Milbank, Tweed, Hope & Hadley, Esqs., Attorneys for Respondent, The Chase National Bank of the City of New York, 15 Broad Street, New York 7, N. Y.

Sidney Posner, Esq., Attorney for the Respondent, John J. McCloskey, Jr., as Sheriff of the City of New York,

Hall of Records, 31 Chambers Street, New York 7, N. Y.
 Joseph M. Cohen, Esq., Attorney for Respondent, Leo Zittman, 36 West 44th Street, New York 18, N. Y.
 Clerk of the United States District Court, Southern District of New York, United States Courthouse, Foley Square, New York, N. Y.

[fol. 109] UNITED STATES DISTRICT COURT, SOUTHERN
 DISTRICT OF NEW YORK

NOTICE OF APPEAL BY LEO ZITTMAN—March 7, 1949

Sirs:

Notice is hereby given that Leo Zittman, one of the respondents above named, hereby appeals to the United States Court of Appeals for the Second Circuit, from the final decree dated January 13, 1949 and entered herein on January 20, 1949.

Dated, New York, N. Y., March 7, 1949.

Yours, etc., Joseph M. Cohen, Attorney for Respondent, Leo Zittman, Office & P. O. Address:
 36 West 44th Street, New York 18, N. Y.

[fol. 110] To: John F. X. McGohey, Esq., United States Attorney, Attorney for Petitioner, United States Courthouse, Foley Square, New York, N. Y.

Milbank, Tweed, Hope & Hadley, Esqs., Attorneys for Respondent, The Chase National Bank of the City of New York, 15 Broad Street, New York 7, N. Y.

Sidney Posner, Esq., Attorney for the Respondent, John J. McCloskey, Jr., as Sheriff of the City of New York, Hall of Records, 31 Chambers Street, New York 7, N. Y.

Katz & Sommerich, Esqs., Attorneys for Respondent, John F. McCarthy, 120 Broadway, New York 5, N. Y.

Clerk of the United States District Court, Southern District of New York, United States Courthouse, Foley Square, N. Y., N. Y.

[fol. 111] UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK

NOTICE OF APPEAL BY JOHN J. McCLOSKEY—March 11, 1949

Sirs:

Notice is hereby given that John J. McCloskey, as Sheriff of the City of New York, one of the respondents above named, hereby appeals to the United States Court of Appeals for the Second Circuit, from the final decree dated January 13, 1949 and entered herein on January 20, 1949.

Dated, New York, N. Y., March 11, 1949.

Yours, etc., Sidney Posner, Attorney for Respondent, John J. McCloskey, as Sheriff of the City of New York, Office & P. O. Address: Hall of Records, 21 Chambers Street, New York 7, N. Y.

[fol. 112] To: John F. X. McGohey, Esq., United States Attorney, Attorney for Petitioner, United States Courthouse, Foley Square, New York, N. Y.

Milbank, Tweed, Hope & Hadley, Esqs., Attorneys for Respondent, The Chase National Bank of the City of New York, 15 Broad Street, New York 7, N. Y.

Joseph M. Cohen, Esq., Attorney for Respondent, Leo Zittman, 36 West 44th Street, New York 18, N. Y.

Katz & Sommerich, Esqs., Attorneys for Respondent, John F. McCarthy, 120 Broadway, New York 5, N. Y.

Clerk of the United States District Court, Southern District of New York, United States Courthouse, Foley Square, N. Y., N. Y.

[fol. 113] UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK

STIPULATION AS TO RECORD—Sept. 30, 1949

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties to the appeals herein, the Chase National Bank of the City of New York not having appealed from the decree

dated January 13, 1949 and the time within which to appeal having expired.

Dated, New York N. Y., November 30, 1949.

John F. X. McGohery, Attorney for Petitioner-Appellee.

Sidney Posner, Attorney for Respondent-Appellant,
John J. McCloskey, Jr.

Joseph M. Cohen, Attorney for Respondent-Appellant, Leo Zittman.

Katz & Sommerich, Attorneys for Respondent-Appellant, John F. McCarthy.

[fol. 114] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 1] IN THE UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

J. HOWARD McGRATH, Attorney General, as successor to the
Alien Property Custodian, Petitioner-Appellee,

against

FEDERAL RESERVE BANK OF NEW YORK, and JOHN J. McCLOSKEY, Jr., as Sheriff of the City of New York, and LEO ZITTMAN, and JOHN F. MCCARTHY, Respondents-Appellants.

STATEMENT UNDER RULE XV

This cause was commenced on or about January 23, 1948.

The order to show cause issued pursuant to the petition of Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, petitioner-appellee, was filed on January 30, 1948. The answer of the respondent-appellant, John F. McCarthy, was filed on February 6, 1948. The answer of the respondent-appellant, Leo Zittman, was filed on February 27, 1948. The amended answer of the respondent-appellant, John J. McCloskey, Jr., as Sheriff of the City of New York, was filed on October 20, 1948. The response of the Federal Reserve Bank of New York to the order to show cause was filed on October 20, 1948.

The respondents have not been arrested nor has any bail been taken or property attached or arrested.

[fol. 2] The original parties to this cause are those set forth in the caption hereof, except that Tom C. Clark, as Attorney General was the original petitioner below and appellee herein and he was substituted by J. Howard McGrath, who succeeded him as Attorney General since the appeals herein were taken.

The cause came on for hearing on March 5 and March 17, 1948, before the Honorable William Bondy, District Judge.

No question was referred to a Commissioner, Master or Referee.

The final decree was entered on January 20, 1949.

The appeal was taken by the respondent, John F. McCarthy, by notice of appeal filed March 2, 1949; the appeal was taken by the respondent, Leo Zittman, by notice of appeal filed March 7, 1949; and the appeal was taken by the respondent, John J. McCloskey, Jr., as Sheriff of the City of New York, by notice of appeal filed March 18, 1949. The respondent Federal Reserve Bank of New York has not appealed.

[fol. 3] IN THE UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK

TOM C. CLARK, Attorney General, as successor to the Alien
Property Custodian, Petitioner,

v.

FEDERAL RESERVE BANK OF NEW YORK, and JOHN J. McCLOSKEY, Jr., as Sheriff of the City of New York, and LEO ZITTMAN, and JOHN F. MCCARTHY, Respondents.

ORDER TO SHOW CAUSE—January 23, 1948

Upon the annexed petition of Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, by his attorney, John F. X. McGohey, United States Attorney for the Southern District of New York, sworn to on the 23rd day of January, 1948, and the exhibits annexed thereto, and good cause appearing therefor, it is

Ordered that the respondents herein, Federal Reserve Bank of New York, John J. McCloskey, Jr., Leo Zittman and John F. McCarthy, respectively, show cause at a motion term of this Court to be held in Room 506, United States Court House, Foley Square, Borough of Manhattan, City of New York, at 10:30 A. M. on the 6th day of February, 1948, or as soon thereafter as counsel may be heard, why a decree should not be entered herein declaring that by virtue of Vesting Order No. 7794, the Turnover Directive issued pursuant thereto, and the letter of October 14, 1946, of the then Alien Property Custodian, petitioner is entitled to possession of the entire balance [fol. 4] remaining in the Deutsche Reichsbank accounts on the books of the respondent Federal Reserve Bank of New York together with all accrued dividends and accumulations, and for such other and further relief as the Court may deem just.

Service of a copy of this order upon the respondents together with copies of the papers upon which it is based, on or before January 30th, 1948 shall be deemed sufficient.

Dated: New York, N. Y., January 23rd, 1948.

John Bright, U. S. D. J.

[fol. 5] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

PETITION

Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, by his attorney, John F. X. McGohey, United States Attorney for the Southern District of New York, prays for an order to show cause against the above-named respondents for the following grounds:

1. This Court has jurisdiction under Section 17 of the Trading with the Enemy Act of October 6, 1917, as amended (40 Stat. 425; United States Code, Title 50, Appendix, Section 17) and under the Federal Declaratory Judgment Act of June 14, 1934, as amended (48 Stat. 955; United States Code, Title 28, Section 400).

2. Respondent Federal Reserve Bank of New York is a federal reserve bank established under the laws of the

United States, with its principal place of business in the City of New York, State of New York, within this District.

3. Respondent John J. McCloskey, Jr., is the duly appointed, qualified and acting Sheriff of the City of New York, and in such capacity is, among other things, the immediate successor of Daniel E. Finn, Jr., as Sheriff of the County of New York, with full power by operation of law to complete the unfinished business of the latter's office; and is a resident of the State of New York.

4. Respondent Leo Zittman is, upon information and belief, a resident of the State of New York.

5. Respondent John F. McCarthy, Jr., is, upon information and belief, a resident of the State of New York.

[fol. 6] 6. For some time prior to December 7, 1941, the Deutsche Reichsbank, the Central Bank of Germany, a non-resident of the State of New York, maintained four deposit accounts with respondent Federal Reserve Bank of New York. With the application of the "freezing" controls of Executive Order No. 8389 (5 Federal Register 1400) to nationals of Germany by Executive Order No. 8785 (6 Federal Register 2897), effective June 14, 1941, these accounts became "blocked," the transfer of any interest therein was prohibited, and transactions relating thereto were forbidden except as specifically authorized by the Secretary of the Treasury. The balances in the Reichsbank accounts totalled \$862,469.61 on December 11, 1941, and \$953,683.07 on January 21, 1942.

7. That on or about December 11, 1941, respondent Leo Zittman commenced an action in the Supreme Court of the State of New York, Kings County, against Deutsche Reichsbank (Action No. 16183-1941). Pursuant to a warrant of attachment procured by respondent Zittman, the Sheriff of the County of New York, then Daniel E. Finn, Jr., on or about December 11, 1941, purported to levy upon said accounts of Deutsche Reichsbank by serving a certified copy of a warrant of attachment upon the respondent Federal Reserve Bank of New York. Thereafter, on March 27, 1942, and following the service by publication and mailing of the summons in said action upon Deutsche Reichsbank, judgment by default for \$94,609.37 in favor of respondent Zittman was entered against Reichsbank.

8. No specific authorization from Foreign Funds Control for the acquisition of any interest in the "blocked" ac-

counts or the funds represented thereby was ever obtained by respondent Zittman, nor was any license ever obtained authorizing respondent Federal Reserve Bank to pay the said judgment out of the "blocked" accounts (Exhibit A). To date no execution has been had on the judgment.

[fol. 7] 9. On or about January 20, 1942, respondent John F. McCarthy commenced an action in the Supreme Court of the State of New York Kings County, against Deutsche Reichsbank (Action No. 719-1942). Pursuant to a warrant of attachment procured by respondent McCarthy, the Sheriff of the City of New York, respondent, John J. McCloskey Jr., on or about January 21, 1942, purported to levy upon said accounts of Deutsche Reichsbank by serving a certified copy of a warrant of attachment upon the respondent Federal Reserve Bank of New York. Thereafter, on April 24, 1942, and following the service by publication and mailing of the summons in said action upon Deutsche Reichsbank, judgment by default for \$29,660.21 in favor of respondent McCarthy was entered.

10. On May 29, 1942, the Foreign Funds Control of the United States Treasury Department denied Application No. NY401383 of respondent McCarthy dated April 25, 1942, for a license authorizing respondent Federal Reserve Bank of New York to pay the said judgment out of the "blocked" accounts. No other specific authorization from Foreign Funds Control for the acquisition of any interest in the "blocked" accounts or the funds represented thereby was ever obtained by respondent McCarthy, nor was any license ever obtained to authorize respondent Federal Reserve Bank to pay the said judgment out of the "blocked" accounts (Exhibit B). To date no execution has been had on the judgment.

11. James E. Markham, then Alien Property Custodian of the United States, on October 3, 1946, executed Vesting Order No. 7794 (11 Federal Register 11782) vesting the debts or other obligations owing to Deutsche Reichsbank by the respondent Federal Reserve Bank of New York arising out of the said bank accounts, including any and all rights to demand, enforce and collect the same (Exhibit C). On October 14, 1946, the Custodian issued [fol. 8] a Turnover Directive addressed to the respondent Bank which recited the pertinent provisions of Vesting Order No. 7794, determined that the proceeds of the account

obligations of the Bank to Deutsche Reichsbank in the total principal amount of \$1,003,382.78 are property that was vested by said Vesting Order, and required that said property, together with all dividends, accumulations and increments be forthwith turned over to the Custodian (Exhibit D). A copy of the Vesting Order, and the Turnover Directive, were served upon the respondent Bank under covering letter of the same date (Exhibit E).

12. By Executive Order No. 9788, effective October 15, 1946 (11 Federal Register 11981) all authority, rights, privileges, powers, duties and functions vested in the Office of Alien Property Custodian were vested, transferred and delegated to the Attorney General, and all property or interests vested in or transferred to the Alien Property Custodian or seized by him were transferred to the Attorney General.

13. Under date of June 11, 1947, respondent Federal Reserve Bank of New York acknowledged receipt of the letter of October 14, 1946, of the Vesting Order and the Turnover Directive, and in purported compliance with the Turnover Directive, transmitted to the Assistant Attorney General and Director of the Office of Alien Property two checks in the amounts of \$49,744.71 and \$653,638.07, respectively, but expressly withheld a balance of \$300,000 standing in the account of the Reichsbank on the books of the respondent Bank as of that date (Exhibit F):

14. Respondent Federal Reserve Bank still refuses to comply in full with Vesting Order No. 7794, the Turnover Directive, and the letter of October 14, 1946.

15. No previous application has been made for the relief herein requested.

[fol 9] Wherefore, the petitioner prays that an order issue requiring the respondents to show cause why a decree should not be entered declaring that by virtue of Vesting Order No. 7794, the Turnover Directive and the letter of October 14, 1946, the petitioner is entitled to possession of the entire balance remaining in the Deutsche Reichsbank account on the books of the respondent Federal Reserve Bank of New York, together with all accrued dividends and accumulations.

John F. X. McGohey, United States Attorney for the Southern District of New York, By Lawrence H. Axman, Assistant United States Attorney, Attorney for Petitioner.

[fol. 10] EXHIBIT A, ANNEXED TO PETITION

I, John S. Richards, certify that I am the Director of Foreign Funds Control, Treasury Department, Washington, D. C., and as such have custody of the records and files of Foreign Funds Control and that I have caused diligent search to be made of the records and files of Foreign Funds Control, and no record or entry has been found to exist therein that any specific authorization was ever obtained from this office by Leo Zittman for the acquisition of any interest in any deposit accounts maintained in the name of the Deutsche Reichsbank by the Federal Reserve Bank of New York or in the funds represented thereby or that licenses were ever obtained authorizing the Federal Reserve Bank to pay any judgment in favor of said Zittman out of such "blocked" accounts.

John S. Richards.

Subscribed and sworn to before me at Washington, D. C. this 15 day of January, 1948.

(Seal) Pearl W. Field (officer administering oath)

My Commission expires June 21, 1948.

[fol. 11] EXHIBIT B, ANNEXED TO PETITION

I, John S. Richards, certify that I am the Director of Foreign Funds Control, Treasury Department, Washington, D. C., and as such have custody of the records and files of Foreign Funds Control and that I have caused diligent search to be made of the records and files of Foreign Funds Control, and no record or entry has been found to exist therein that any specific authorization was ever obtained from this office by John F. McCarthy for the acquisition of any interest in any deposit accounts maintained in the name of the Deutsche Reichsbank by the Federal Reserve Bank of New York or in the funds represented thereby or that licenses were ever obtained authorizing the Federal Reserve Bank to pay any judgment in favor of said McCarthy out of such "blocked" accounts. Our records however, disclose that on May 29, 1942, this office denied Application No. NY401383, filed by Henry I. Fill-

man, attorney for said McCarthy, dated April 25, 1942, for a license authorizing the Federal Reserve Bank to pay out of said blocked accounts a portion of a judgment obtained in favor of said McCarthy in an action in the Supreme Court of the State of New York, Kings County, entitled, "John F. McCarthy, plaintiff, against Reichsbank, defendant."

John S. Richards

Subscribed and sworn to before me at Washington, D. C., this 15 day of January 1948.

(Seal) Pearl W. Field (officer administering oath)

My Commission expires June 21, 1948.

[fol. 12] EXHIBIT C, ANNEXED TO PETITION

UNITED STATES OF AMERICA, OFFICE OF ALIEN PROPERTY
CUSTODIAN

Vesting Order Number 7794

Re: Obligations owned by Deutsche Reichsbank, also known as Reichsbank, and as Reichsbank-Direktorium

Under the authority of the Trading with the enemy Act, as amended, and Executive Order No. 9095, as amended, and pursuant to law, the undersigned, after investigation finding:

1. That Deutsche Reichsbank, also known as Reichsbank and as Reichsbank-Direktorium, the last known address of which is Berlin, Germany, is a corporation organized under the laws of Germany, and which has or, since the effective date of Executive Order No. 8389, as amended, has had its principal place of business in Germany and is a national of a designated enemy country (Germany);
2. That the property described as follows:
 - a. Those certain debts or other obligations owing to Deutsche Reichsbank, also known as Reichsbank, and as Reichsbank-Direktorium, by Federal Reserve

Bank of New York, New York 7, New York, arising out of bank accounts entitled Reichsbank, Reichsbank Special Account, Reichsbank-Direktorium, Standstill Account 1938 No. 2 and Reichsbank-Direktorium, Standstill Account 1938 No. 3, and any and all rights to demand, enforce and collect the same, and

- b. Those certain debts or other obligations evidenced by the checks or other credit instruments endorsed by the aforesaid Deutsche Reichsbank and presently [fol. 13] held by the Federal Reserve Bank of New York, New York 7, New York, for collection and credit to the aforesaid Deutsche Reichsbank, also known as Reichsbank, and as Reichsbank-Direktorium, which checks or other credit instruments are identified in Exhibit A, attached hereto and by reference made a part hereof, together with all rights in, to and under, including particularly, but not limited to, the rights to possession and presentation for collection and payment of the aforesaid checks or other credit instruments and any and all rights to demand, enforce and collect the same,

is property within the United States owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by, the aforesaid national of a designated enemy country;

And determining that to the extent that such national is a person not within a designated enemy country, the national interest of the United States requires that such person be treated as a national of a designated enemy country (Germany);

And having made all determinations and taken all action required by law, including appropriate consultation and certification, and deeming it necessary in the national interest,

Hereby Vests in the Alien Property Custodian the property described above, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest and for the benefit of the United States.

Such property and any or all of the proceeds thereof

shall be held in an appropriate account or accounts, pending further determination of the Alien Property Custodian. [fol. 14] This Order shall not be deemed to constitute an admission by the Alien Property Custodian of the lawfulness of, or acquiescence in, or licensing of, any set-offs, charges or deductions, nor shall it be deemed to limit the power of the Alien Property Custodian to return such property or the proceeds thereof in whole or in part, nor shall it be deemed to indicate that compensation will not be paid in lieu thereof, if and when it should be determined to take any one or all of such actions.

The terms "national" and "designated enemy country" as used herein shall have the meanings prescribed in Section 10 of Executive Order No. 9095, as amended.

Executed at Washington, D. C., on October 3, 1946.

Signed, James E. Markham, Alien Property Custodian.

I hereby certify that the within is a true and correct copy of the original paper on file in this office. For the Attorney General David L. Bazelon, Assistant Attorney General Director, Office of Alien Property.

By Loyola M. Blanton, Assistant Secretary of Records.

(Official Seal)

[fol. 15]

Re: Obligations owned by Deutsche Reichsbank, also known
as Reichsbank, and as Reichsbank-Direktorium

EXHIBIT A

Schedule of Checks or Other Credit Instruments Held by Federal Reserve Bank
of New York for Collection and Credit

Date of Check	Drawer	Number	Drawee	Amount
7/15/41	American Embassy	2367	Treasurer U.S.	\$1,000.00
	Naval Attache	58-763		
7/16/41	War Finance Officer USA	1052	" "	686.26
		210-366		
7/15/41	American Embassy	2366	" "	600.00
	Naval Attache	58-763		
7/17/41	War Finance Officer USA	1053	" "	17.45
		210-366		
6/30/41	Special Disb. Officer	4528	" "	252.37
		09-075		
6/30/41	" "	4502	" "	161.23
		09-075		
3/31/41	" "	4129	" "	167.31
		09-075		
6/23/41	" "	4427	" "	111.26
		09-075		
4/30/41	" "	4256	" "	133.98
		09-075		
6/30/41	" "	4522	" "	84.37
		09-075		
[fol. 16]				
6/30/41	" "	4493	" "	126.56
		09-075		
6/30/41	" "	4492	" "	130.27
		09-075		
7/24/41	" "	4563	" "	655.96
		09-121		
7/25/41	" "	4564	" "	278.07
		09-121		
7/28/41	Jeanette Pohlman		Riggs N/B Washington	40.00
7/31/41	Special Disb. Officer	4645	Treasurer U.S.	97.70
		09-121		
7/31/41	" "	4662	" "	135.24
		09-121		
7/31/41	" "	4663	" "	94.67
		09-121		
7/31/41	" "	4664	" "	130.51
		09-121		
7/31/41	" "	4665	" "	54.10
		09-121		
7/31/41	" "	4666	" "	40.57
		09-121		
7/31/41	" "	4667	" "	33.81
		09-121		
7/31/41	" "	4619	" "	130.27
		09-121		
7/31/41	" "	4634	" "	118.12
		09-121		
[fol. 17]				
7/31/41	" "	4633	" "	113.98
		09-121		
8/ 8/41	War Finance Officer	1102	" "	256.83
		210-366		

Date of Check	Drawer	Number	Drawee	Amount
8/—/41	Jeanette Pohlman		Riggs N/B Washington	120.00
8/25/41	Special Disb. Officer	4683	Treasurer U.S.	133.62
8/31/41	" "	09-121	" "	84.37
8/31/41	" "	4767	" "	
		09-121	" "	130.27
8/31/41	" "	4742	" "	
		09-121	" "	211.07
7/31/41	War Finance Officer	1084	" "	
6/30/41	Special Disb. Officer	210-366	" "	208.18
		4501	" "	
8/31/41	" "	09-075	" "	94.67
		4792	" "	
8/31/41	" "	09-121	" "	40.57
		4795	" "	
8/31/41	" "	09-121	" "	135.24
		4791	" "	
8/31/41	" "	09-121	" "	130.51
		4793	" "	
8/31/41	" "	09-121	" "	54.10
		4794	" "	
8/31/41	" "	09-121	" "	33.81
		4796	" "	
		09-121	" "	
[fol. 18]				
10/ 1/40	Chief Disb. Officer	5,226,484	" "	33.32
		894-404	" "	
9/ 1/40	" "	5,079,849	" "	33.32
		894-404	" "	
9/12/41	Special Disb. Officer	4872	" "	151.87
		09-121	" "	
7/30/41	Jeanette Pohlman		Riggs N/B, Wash., D. C.	30.00
7/28/41	American Embassy Commissary Berlin signed W. S. Howard		" "	2,250.60
7/29/41	Cyrus B. Follmer		Guaranty Tr. Co. of N. Y. 5th Avenue Branch	225.00
7/30/41	Phillip N. Fahrenholz		Riggs N/B, Wash., D. C.	250.00
8/ 2/41	G. Edith Bland		American Sec. & Tr. Co., Wash., D. C. (Central Branch)	200.00
7/31/41	Spec. Disb. Officer	4628	Treasurer U.S.	126.56
		09-121	" "	
7/31/41	" "	4622	" "	130.27
		09-121	" "	
7/31/41	" "	4620	" "	126.56
		09-121	" "	
7/31/41	Amer Embassy	2382	" "	50.62
	Naval Att. Berlin	58-763	" "	
7/31/41	Spec. Disb. Officer	4647	" "	89.55
		09-121	" "	
7/31/41	Finance Off. U.S.A.	1056	" "	352.80
		210-366	" "	
[fol. 19]				
7/31/41	Amer. Embassy	2383	" "	50.62
	Naval Att. Berlin	58-763	" "	
7/31/41	Finance Off. U.S.A.	1067	" "	38.51
		210-366	" "	
7/31/41	Spec. Disb. Officer	4578	" "	547.69
		09-121	" "	
6/30/41	" "	4521	" "	84.37
		09-075	" "	
5/31/41	" "	4391	" "	84.37

Date of Check	Drawer	Number	Drawee	Amount
11/30/40	" "	09-075 3657	" "	101.74
7/31/41	" "	09-075 4600	" "	339.24
8/14/41	Carlton Hurst, Miami, Florida	09-121	Florida Nat'l Bk. & Tr. Co. Miami, Florida	100.00
8/14/41	Carlos T. Warner Acct. # 114435		Washington Loan & Tr. Co. Washington, D. C.	400.00
8/15/41	Disb. Off.	2908	Treasurer U.S.	50.62
8/15/41	" "	58-763 2918	" "	50.62
6/30/41	Spec. Disb. Officer	4510 09-075	" "	238.77
8/19/41	Jack Wade Demanoy		Riggs N/B, Washington, D. C.	200.00
8/16/41	Disb. Off.	2920 58-763	Treasurer U.S.	24.40
10/10/41	Lena C. Paul		Manufacturers Tr. Co., N. Y. 131 East 23rd St., N. Y.	125.00

[fol. 20] EXHIBIT D, ANNEXED TO PETITION

Office of Alien Property Custodian
Washington

Turn-Over Directive

Re: Property of Deutsche Reichsbank, also known as Reichsbank, and as Reichsbank-Direktorium Vesting Order Number 7794 (11 Fed. Reg. 11782, October 10, 1946).

To: Federal Reserve Bank of New York
New York 7, New York

The undersigned, under the authority of the Trading with the enemy Act, as amended, and Executive Order No. 9095, as amended, and pursuant to law, and having made all the determinations and taken all action, after appropriate consultation and certification, required by said Executive Order and Act, or otherwise, executed and issued Vesting Order No. 7794 dated October 3, 1946 (a copy of which is annexed hereto and made a part hereof), and thereby vested the following described property of Deutsche Reichsbank, also known as Reichsbank, and as Reichsbank-Direktorium, a national of a designated enemy country (Germany):

a. Those certain debts or other obligations owing to Deutsche Reichsbank, also known as Reichsbank, and as Reichsbank-Direktorium, by Federal Reserve Bank

of New York 7, New York, arising out of bank accounts more particularly identified in sub-paragraph 2-a of said Vesting Order Number 7794, and any and all rights to demand, enforce and collect the same, and

b. Those certain debts or other obligations evidenced by the checks or other credit instruments identified in Exhibit A, attached to and by reference made a [fol. 21] part of said Vesting Order Number 7794, together with all rights in, to and under, including particularly, but not limited to, the rights to possession and presentation for collection and payment of the aforesaid checks or other credit instruments and any and all rights to demand, enforce and collect the same.

Under the authority above set forth, the undersigned does hereby find and determine that the following described property (hereinafter referred to as the said property), to-wit:

- a. The proceeds of the above-described obligations of said Federal Reserve Bank of New York, in the total principal amount of \$1,003,382.78, represented by the above-mentioned bank accounts in the amounts of \$334,801.22, \$667,904.15, \$672.55 and \$4.86, respectively, and
- b. All those checks or other credit instruments identified in Exhibit A, attached to and by reference made a part of said Vesting Order Number 7794,

now in your possession or under your control is property that was vested in the undersigned by the said vesting order.

The terms "national" and "designated enemy country" as used herein shall have the meanings prescribed in Section 10 of said Executive Order.

Your attention is invited to Section 5(b) of the Trading with the enemy Act, as amended, which provides that

"Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any [fol. 22] rule, regulation, instruction, or direction is

sued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder."

The undersigned does hereby require that the said property, together with all dividends, accumulations and increment thereon, shall forthwith be by you turned over to the undersigned to be held, administered and accounted for as provided by law.

Executed at Washington, D. C., on October 4, 1946.

(Signed) James E. Markham, Alien Property Custodian.

I hereby certify that the within is a true and correct copy of the original paper on file in this office.

For the Attorney General, David L. Bazelon, Assistant Attorney General, Director, Office of Alien Property.

By Donald Shaw, Secretary.

(Seal.)

[fol. 23] EXHIBIT E, ANNEXED TO PETITION

October 14, 1946

In replying, please refer to: JEM:WJR:AFW:rf

F-28-1282-C-3 V.O. No. 7794

Federal Reserve Bank of New York, New York 7, New York.

Gentlemen:

Enclosed is a certified copy of Vesting Order No. 7794 executed October 3, 1946 by the Alien Property Custodian, vesting in himself as Alien Property Custodian "Obligations owned by Deutsche Reichsbank, also known as Reichsbank, and as Reichsbank-Direktorium," together with the signed original Turn-over Directive, directed to the Federal Reserve Bank, New York 7, New York.

For the purpose of identifying Deutsche Reichsbank, also known as Reichsbank, and as Reichsbank-Direktorium on the books and records of the Alien Property Custodian, Account No. 28-18101 has been assigned.

With reference to those certain debts or other obligations owing to Deutsche Reichsbank, also known as Reichsbank, and as Reichsbank-Direktorium, by Federal Reserve Bank of New York, New York 7, New York, arising out of bank accounts entitled Reichsbank, Reichsbank Special Account, Reichsbank-Direktorium, Standstill Account 1938 No. 2, and Reichsbank-Direktorium, Standstill, Account 1938 No. 3, more fully described in sub-paragraph 2(a) of Vesting Order No. 7794 and sub-paragraph (a) of the Turn-over Directive, you are authorized and directed to forward your check for those amounts to the Alien Property Custodian, Washington, D. C., attention of the Property Division. The check should be made payable to the "Alien Property Custodian, Washington, D. C., Account No. 28-18101."

[fol. 24] With reference to those certain debts or other obligations evidenced by the checks or other credit instruments endorsed by the aforesaid Deutsche Reichsbank and presently held by the Federal Reserve Bank of New York, New York 7, New York, for collection and credit to the aforesaid Deutsche Reichsbank, also known as Reichsbank, and as Reichsbank-Direktorium, more fully described in subparagraph 2(b), Exhibit A, of Vesting Order No. 7794 and sub-paragraph (b) of the Turn-over Directive, you are further authorized and directed to forward those checks and-or other credit instruments to the Alien Property Custodian, Washington, D. C., attention of the Property Division.

Please sign the acknowledgment on the attached copy of this letter and return same in the franked addressed envelope enclosed for that purpose and advise this office of your action in the matter.

Very truly yours, James E. Markham, Alien Property Custodian.

Enclosures

Receipt is hereby acknowledged of the original of this letter and of a certified copy of Vesting Order No. 7794 this 15th day of October 1946.

Federal Reserve Bank of New York, By /s/ Walter S. Logan, Vice President and General Counsel

[fol. 25] EXHIBIT F, ANNEXED TO PETITION

FEDERAL RESERVE BANK OF NEW YORK

New York 45, N. Y.
June 11, 1947.

Mr. David L. Bazelon, Assistant Attorney General, Director of Office of Alien Property, Department of Justice, Washington 25, D. C.

Dear Sir:

In my conversation with Mr. John W. Cutler, then Acting General Counsel of the Office of Alien Property, when Mr. George B. Vest, General Counsel of the Board of Governors of the Federal Reserve System, and I called on him on April 15, 1947, I mentioned that it was my intention to recommend that the Federal Reserve Bank of New York pay to the Office of Alien Property a part of the balance to the credit of the Reichsbank account on the books of the Federal Reserve Bank of New York retaining and holding a sufficient amount to cover the judgments obtained against the Reichsbank in the two actions in which attachments were levied against that account by the service on the Federal Reserve Bank of New York of certified copies of warrants of attachment. I am now writing this letter in accordance with that conversation.

In this connection, reference is made to the letter dated October 14, 1946, from James E. Markham, Alien Property Custodian (office of Alien Property Custodian, ref. JEM:WJR:AFW:rf RF-28-1282-C-3 V.O. No. 7794) ad-

addressed to the Federal Reserve Bank of New York, the enclosures with such letter (consisting of a certified copy of Vesting Order Number 7794, dated October 3, 1946, entitled "Re: Obligations Owned by Deutsche Reichs-[fol. 26] bank, also known as Reichsbank and as Reichsbank Direktorium," and a "Turn-Over Directive" addressed to Federal Reserve Bank of New York) and our reply dated October 18, 1946.

In our reply we referred, as we had done in previous discussions and correspondence, to the attachments which had been levied against the account of the Reichsbank on our books, by service on this bank in December 1941 and January 1942 of certified copies of warrants of attachment in two actions in the Supreme Court of the State of New York; and we stated that we believed a court decree or order should be obtained vacating the attachments or otherwise making a judicial determination which would be binding on the attaching creditors and the sheriff to the effect that the Federal Reserve Bank of New York is obligated to pay over to the Alien Property Custodian the amount of the balances in the Reichsbank account notwithstanding the attachments.

Thereafter we from time to time discussed and corresponded with Mr. Cutler and others in his office as to the procedure to be followed by the Office of Alien Property with respect to the vesting order and turn-over directive; and about April 4 Mr. Schlesinger telephoned to me and said that the present intention of the Office of Alien Property was either to apply in the state court for vacation of the attachments, or to bring some other proceeding in which the attaching creditors would be joined as well as the Federal Reserve Bank of New York.

The balances in the Reichsbank account on December 11, 1941, and January 21, 1942, when the certified copies of warrants of attachments were served on us in the *Zittman* and *McCarthy* cases, respectively, and the amounts collected after those dates on items previously received for account of the Reichsbank, were as follows:

[fol. 27]

Reichsbank Account December 11, 1941
Account designated
"Reichsbank"

Balance.....\$219,517.47
Collected after 12/11/41 on items previously received.....58.13

Total.....\$219,575.60

Account designated
"Reichsbank Special Account"

Balance.....\$563,680.32
Collected after 12/11/41 on items previously received.....78,536.28

Total.....\$642,216.60

Account designated
"Reichsbank-Direktorium,
Standstill Account 1938 No. 2"

Balance.....\$ 672.55

Account designated
"Reichsbank-Direktorium,
Standstill Account 1938 No. 3"

Balance.....\$ 4.86

Total.....\$862,469.61

[fol. 28]

Reichsbank Account January 21, 1942
Account designated
"Reichsbank"

Balance.....\$218,321.60
Collected after 1/21/42 on items previously received.....66,737.37

Total.....\$285,061.97

Account designated
"Reichsbank Special Account"

Balance.....\$667,898.69

Account designated
"Reichsbank-Direktorium,
Standstill Account 1938 No. 2"

Balance.....\$ 672.55

Account designated
"Reichsbank-Direktorium,
Standstill Account 1938 No. 3"

Balance.....\$ 4.86

Total.....\$953,638.07

The amounts of the judgments against the Reichsbank in the actions in which attachments have been levied on the account are as follows:

In the action by Leo Zittman, plaintiff, against the Reichsbank and Deutsche Golddiscountbank, defendants, judgments, judgment was entered in the Supreme Court of the State of New York, County of Kings, on March 27, 1942, for \$94,609.37.

[fol. 29] In the action by John F. McCarthy, plaintiff, against the Reichsbank, defendant, judgment was entered in the Supreme Court of the State of New York, County of Kings, on April 24, 1942, for \$29,660.21.

The balances in the Reichsbank account on our books as of the close of business June 10, 1947, were as follows:

Account designated	
"Reichsbank"	\$ 334,801.22
Account designated	
"Reichsbank Special Account"	\$ 667,904.15
Account designated	
"Reichsbank-Direktorium, Standstill Account 1938 No. 2"	\$ 672.55
Account designated	
"Reichsbank-Direktorium, Standstill Account 1938 No. 3"	\$ 4.86
Total	\$1,003,382.78

We enclose herewith checks of this bank dated June 11, 1947, in the form requested in the letter dated October 14, 1946, from the Alien Property Custodian as construed in accordance with paragraph (b) of section 500.41 of part 500 of title 8 of the Code of Federal Regulations (i. e., payable to "Attorney General of the United States, Washington, D. C., Account No. 28-18101") as follows:

Check No. F.D. 36444 in the amount of \$49,744.71, representing net credits to the Reichsbank account on the books of this bank since January 21, 1942, exclusive of amounts collected after that date on items previously received (i. e., the difference between \$1,003,382.78, the total of the balances to the

credit of that account as of the close of business June [fol. 30] 10, 1947, and \$953,638.07; the total of the balances on January 21, 1942, and the amounts collected after that date on items previously received). Check No. F.D. 36446 in the amount of \$653,638.07.

The enclosed checks, described above, represent payments pursuant to Vesting Order Number 7794 and the "Turn-over Directive" issued thereunder, a certified copy of which vesting order and the original of which turn-over directive were transmitted to the Federal Reserve Bank of New York with the letter dated October 14, 1946, from the Alien Property Custodian.

The enclosed checks have been charged today to the Reichsbank account on the books of this bank, making the total of the balances in that account, as of the close of business today, June 11, 1947, \$300,000.00. We enclose a statement of the account as of this date.

The disposition of the \$300,000 will presumably be determined in the proceeding or proceedings, to be brought by the Office of Alien Property, to which this bank, the attaching creditors and the sheriff will be parties.

Your acknowledgment of the receipt of this letter and the enclosed checks will be appreciated.

Very truly yours, /s/ Walter S. Logan, Vice President and General Counsel.

Enclosures.

[fol. 31] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

RESPONSE TO ORDER TO SHOW CAUSE BY FEDERAL RESERVE
BANK

The respondent, Federal Reserve Bank of New York, for its response to the order to show cause made herein by Honorable John Bright, United States District Judge, dated January 23, 1948, directing this respondent and the respondents John J. McCloskey, Jr., as Sheriff of the City of New York, Leo Zittman and John F. McCarthy, respectively, to show cause why a decree should not be entered herein declaring that by virtue of Vesting Order

No. 7794, the Turnover Directive issued pursuant thereto, and the letter of October 14, 1946, of the then Alien Property Custodian, petitioner is entitled to possession of the entire balance remaining in the Deutsche Reichsbank accounts on the books of the respondent Federal Reserve Bank of New York, together with all accrued dividends and accumulations, and for such other and further relief as the Court may deem just, by its attorney, Walter S. Logan, respectfully shows as follows:

Respondent Federal Reserve Bank of New York answers the petition herein, verified January 23, 1948, by Laurence H. Axman, as follows:

(1) Admits each and every allegation of fact set forth in paragraphs numbered 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 15 of the said petition herein.

(2) Denies each and every allegation contained in paragraph numbered 14 of the said petition herein; but admits and alleges that on or about October 18, 1946, it sent two letters dated that date addressed to the Alien [fol. 32] Property Custodian (copies of which letters marked Exhibits A and B, respectively, are hereto attached) that with the said letter of which Exhibit B is a copy it sent the checks described in Exhibit A attached to Vesting Order No. 7794 (which checks are referred to in said exhibit as "checks or other credit instruments"), and that on or about June 11, 1947, it sent and delivered to Mr. David L. Bazelon, Assistant Attorney General, Director of the Office of Alien Property, Department of Justice of the United States, a letter dated that date (a copy of which marked Exhibit F is attached to the said petition herein) together with the two checks therein described for \$49,744.71 and \$653,637.07, respectively, and a statement (copy of which marked Exhibit C is hereto attached) of the Reichsbank (also known as Deutsche Reichsbank) account on the books of respondent Federal Reserve Bank of New York as of the close of business on June 11, 1947, that as shown in said statement (Exhibit C) the total of the balances in said account at the close of business on June 11, 1947, was \$300,000, that no part of any of said balances has been paid to petitioner, and that the total of the balances in said account has been at all times since June 11, 1947, and is now, \$300,000.

Respondent Federal Reserve Bank of New York further shows:

(3) That the state of its account with the Reichsbank at the dates of the several levies on warrants of attachment referred to in the said petition herein, and at the close of business on June 10 and June 11, 1947, respectively, was as shown in its said letter dated June 11, 1947, to Mr. David L. Bazelon (Exhibit F attached to the said petition herein); that the state of its said account on October 3, 1946, and October 14, 1946, was the same as on June 10, 1947; and that no dividends, accumulations, [fol. 33] increment, or interest, have accrued, been paid or received, or become due or owing, in or to said account, since October 3, 1946, or at any other time, by virtue of any contract with the Reichsbank or otherwise.

(4) That on December 11, 1941, in the action in the Supreme Court of the State of New York entitled "*Leo Zittman, plaintiff, v. Reichsbank and Deutsche Golddiskontbank, defendant*" (Action No. 16183-1941) referred to in the said petition herein, Honorable Charles J. Dodd, a Justice of the Supreme Court of the State of New York, on the application of said Zittman, the plaintiff in said action, duly and regularly issued a warrant of attachment pursuant to Article 54 of the Civil Practice Act of the State of New York, commanding that the several sheriffs of the counties of New York State should attach and safely keep so much of the property of the Reichsbank within the county of each sheriff, respectively, as would satisfy said Zittman's demand in said action for \$68,940, with accrued interest thereon and costs and expenses; that on December 11, 1941, Daniel E. Finn, Jr., Sheriff of the County of New York, by Deputy Sheriff Michael Cuozzo, duly and regularly executed the said warrant of attachment and levied upon the account of the Reichsbank with respondent Federal Reserve Bank of New York in the manner prescribed by Article 55 of the said Civil Practice Act, by serving upon respondent Federal Reserve Bank of New York a certified copy of said warrant of attachment (a copy of which warrant of attachment, with a copy of the certificate of said Sheriff thereto annexed, is attached hereto marked Exhibit D); that respondent Federal Reserve Bank of New York has not at any time

made any payment, or transferred, paid or delivered any property, to the said Sheriff, or to any successor of said Sheriff, or to any other party, pursuant to said warrant [fol. 34] of attachment; that from time to time and on or about March 5, 1942, June 8, 1942, September 5, 1942, December 7, 1942, March 9, 1943, February 9, 1944, January 13, 1945, January 28, 1946, February 5, 1947, and January 27, 1948, by orders of the Supreme Court of the State of New York, County of Kings, duly made and entered and served as prescribed by section 922 of said Civil Practice Act, the time within which the Sheriff of the City of New York might commence an action or special proceeding prescribed in said section 922, to collect, receive and enforce the debts, effects and things in action attached by him, was extended, and that, by said order made and entered January 27, 1948, and duly served January 29, 1948, such time has been so extended to the 11th day of March, 1949; and that said warrant of attachment has never been vacated or modified nor has the attachment thereunder been released, discharged or otherwise removed.

(5) That on January 21, 1942, in the action in the Supreme Court of the State of New York entitled "*John F. McCarthy, plaintiff, v. Reichsbank, defendant*" (Action No. 719-1942), referred to in the said petition herein, Honorable Meier Steinbrink, a Justice of the Supreme Court of the State of New York, on the application of said McCarthy, the plaintiff in said action, duly and regularly issued a warrant of attachment pursuant to Article 54 of the Civil Practice Act of the State of New York, commanding that the several sheriffs of the counties of New York State should attach and safely keep so much of the property of the Reichsbank within the county of each sheriff, respectively, as would satisfy said McCarthy's demand in said action for \$24,810, with interest thereon from May 30, 1939, and costs and expenses; that on January 21, 1942, John J. McCloskey, Jr., Sheriff [fol. 35] of the City of New York, by Deputy Sheriff Francis Bauman, duly and regularly executed the said warrant of attachment and levied upon the account of the Reichsbank with respondent Federal Reserve Bank of New York in the manner prescribed by Article 55 of the said Civil Practice Act, by serving upon respondent Fed-

eral Reserve Bank of New York a certified copy of said warrant of attachment (a copy of which warrant of attachment, with a copy of the certificate of said Sheriff thereto annexed, is attached hereto marked Exhibit E); that respondent Federal Reserve Bank of New York has not at any time made any payment, or transferred, paid or delivered any property, to the said Sheriff, or to any successor of said Sheriff, or to any other party, pursuant to said warrant of attachment; that from time to time and on or about April 17, 1942, July 16, 1942, October 16, 1942, January 18, 1943, April 16, 1943, April 12, 1944, April 11, 1945, April 15, 1946, and April 15, 1947, by orders of the Supreme Court of the State of New York, County of Kings, duly made and entered and served as prescribed by section 922 of said Civil Practice Act, the time within which the Sheriff of the City of New York might commence an action or special proceeding prescribed in said section 922, to collect, receive and enforce the debts, effects and things in action attached by him, was extended, and that such time, by said order made and entered April 15, 1947, and duly served April 15, 1947, has been so extended to the 22nd day of April, 1948; and that said warrant of attachment has never been vacated or modified nor has the attachment thereunder been released, discharged or otherwise removed:

(6) That section 917.2 of said Civil Practice Act, as at all times herein mentioned and now in full force and effect, [fol. 36] provides that a levy under a warrant of attachment upon property other than real estate, where such property consists of a demand (other than a demand as hereinafter specified, the exceptions not being pertinent to this proceeding) shall be made by leaving a certified copy of the warrant with the person against whom the demand exists, and provides further as follows:

"Any such person so served with a certified copy of a warrant of attachment is forbidden to make or suffer, any transfer or other disposition of, or interfere with, any such property or interest therein so levied upon, or pay over or otherwise dispose of any debt so levied upon, or sell, assign or transfer any right so levied upon, to any person, or persons, other than the sheriff serving the said warrant until

ninety days from the date of such service, except upon direction of the sheriff or pursuant to an order of the court. Any such payment, sale, assignment or transfer shall nevertheless be valid as to the payee or transferee in good faith thereof, and without notice that the warrant has been served."

(7) That section 922.1 of said Civil Practice Act, as at all times herein mentioned and now in full force and effect, provides as follows:

"In the event that the person owing any debt to the defendant, or holding property, effects or things in action of the defendant or interest therein subject to attachment, on which a levy under a warrant has been made, as in this act provided, shall fail or refuse to deliver such personal property attached, or to pay or assign to the sheriff the said debt, effect or thing in action, or interest therein, the sheriff may, and if [fol. 37] indemnified by the plaintiff as hereinafter provided, must within ninety days after the service of the certified copy of the warrant on such person, commence an action or special proceeding to reduce to his actual custody all such personal property capable of manual delivery, and to collect, receive and enforce all debts, effects and things in action attached by him, and may maintain any such action or special proceeding in his name or in the name of the defendant for that purpose. He may discontinue such an action or special proceeding at such time and on such terms as the court or judge directs. The sheriff shall not be obliged to commence any such action or special proceeding to reduce such personal property capable of manual delivery to his actual custody or to collect, receive or enforce debts, effects or things in action of the defendant unless the plaintiff or his attorney requests in writing that such action or special proceeding be commenced, and indemnifies the sheriff for all necessary expenditures incurred or to be incurred by him in connection therewith in manner satisfactory to him or fixed by the court.

"The service of process commencing such action

or special proceeding against any person upon whom a certified copy of a warrant of attachment shall have been served, shall continue as against that person during the pendency of said action or special proceeding all duties and liabilities imposed upon him in the first instance by the service of the said warrant of attachment upon him.

"The time within which such action or special proceeding, as hereinbefore provided, may be commenced [fol. 38] shall be extended beyond the period of ninety days from the date of the service of the said warrant only by order of the court for good cause shown. Such an order may be granted upon *ex parte* application of plaintiff. An order thus extending the time within which such an action or special proceeding may be commenced shall be effective to continue all duties and liabilities of any person on whom a warrant of attachment in the action has been served, provided that a certified copy of the said order is served upon said person prior to the expiration of the said ninety days, or prior to the expiration of the time for commencing such an action or special proceeding as further extended. If notice of the application is served upon such person five days before the return date thereof and prior to the expiration of said ninety days, or prior to the expiration of the time as further extended, such notice shall extend all said duties and liabilities until ten days after an order determining the motion shall have been entered."

(8) That the Supreme Court of the State of New York is a court of record by virtue of section 2 of the Judiciary Law of the State of New York.

(9) That section 750.A.3. of said Judiciary Law provides that a court of record has power to punish for a criminal contempt a person guilty of wilful disobedience to its lawful mandate; that section 753.A.3. and 753.A.8. of said Judiciary Law provide that a court of record has power to punish a neglect or violation of duty by which a right or remedy of a party to a civil action or special proceeding, pending in the court, may be defeated,

[fol. 39] impaired, impeded or prejudiced in certain specified cases including the following:

"3. A party to the action or special proceeding, an attorney, counsellor, or other person, for the non-payment of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution cannot be awarded for the collection of such sum; or for any other disobedience to a lawful mandate of the court," and

"8. In any other case, where an attachment or any other proceeding to punish for a contempt, has been usually adopted and practiced in a court of record, to enforce a civil remedy of a party to an action or special proceeding in that court, or to protect the right of a party."

(10) That section 773 of said Judiciary Law provides as follows:

"If an actual loss or injury has been produced to a party to an action or special proceeding, by reason of the misconduct proved against the offender, and the case is not one where it is specially prescribed by law, that an action may be maintained to recover damages for the loss or injury, a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected, and paid over to the aggrieved party, under the direction of the court. The payment and acceptance of such a fine constitute a bar to an action by the aggrieved party, to recover damages for the loss or injury. Where it is not shown that such an actual loss or injury has been produced, a fine must be imposed, not exceeding the amount of [fol. 40] the complainant's costs and expenses, and two hundred and fifty dollars in addition thereto, and must be collected and paid, in like manner. A corporation may be fined as prescribed in this section."

Wherefore the respondent Federal Reserve Bank of New York prays that any decree herein declaring that petitioner is entitled to possession of the entire balance or balances remaining in the Reichsbank account on the books of respondent Federal Reserve Bank of New York,

shall direct that respondent Federal Reserve Bank of New York shall not be required to pay the amount of said balance or balances to petitioner unless and until the warrants of attachment hereinabove described and the attachments thereunder shall have been vacated, discharged or released and that such decree shall find that there are no accrued dividends or accumulations, and for such other and further relief as the Court may deem just.

(Signed) Walter S. Logan; Attorney for Respondent Federal Reserve Bank of New York.

(Verified by L. Werner Knoke, Feb. 4, 1948.)

[fol. 41] EXHIBIT A, ANNEXED TO RESPONSE

FEDERAL RESERVE BANK OF NEW YORK

October 18, 1946.

Mr. James E. Markham, Alien Property Custodian, Washington 25, D. C.

Your Reference: JEM:WJR:AFW:rf, F-28-1282-C-3 V.O. No. 7794.

Dear Sir:

The receipt is acknowledged of your letter of October 14, 1946, and its enclosures. As requested in your letter, we are returning herewith the carbon copy of your letter which was attached to the original, having signed the following acknowledgment on the copy:

"Receipt is hereby acknowledged of the original of this letter and of a certified copy of Vesting Order No. 7794 this 15th day of October 1946.

Federal Reserve Bank of New York, By Walter S. Logan, Vice President and General Counsel."

We are forwarding to you, under separate cover, the checks described in Exhibit A attached to the vesting order. These checks were received by this bank subsequent to the levy of the attachments on the account of the Reichs-

bank, so that under the New York law these checks are not subject to the attachments.

As explained in our previous discussions and correspondence with your office attachments were levied against the account of the Reichsbank on our books, by service on this bank of certified copies of warrants of attachment in actions in the Supreme Court of the State of New York in December, 1941, and January, 1942; and in view of these attachments we believe that for our protection and [fol. 42] to avoid any appearance of acting in disregard or in violation of the orders of the New York court, an appropriate court decree or order should be obtained vacating the attachments, or otherwise making a judicial determination which will be binding on the attaching creditors and the Sheriff to the effect that the Federal Reserve Bank of New York is obligated to pay over to the Alien Property Custodian the amount of the balances in the Reichsbank account notwithstanding the attachments.

In this connection and for your convenience, we quote the following from our letter dated September 20, 1946, to Mr. Henry G. Hilken, Chief, Division of Investigation, Office of Alien Property Custodian, Washington, D. C., in response to his letter dated September 13, 1946, and confirming telephone conversations with him and with Mr. Worthington:

"As stated in our letter of September 14, 1945, addressed to the Office of Alien Property Custodian, 120 Broadway, New York, N. Y., for the attention of Mr. Ralph W. Orr, Acting Chief, Division of Investigation, in reply to Mr. Orr's letter of August 27, 1945, the Federal Reserve Bank of New York was served in December 1941 and January 1942, with certified copies of warrants of attachment in two actions in New York Supreme Court against the Reichsbank. From time to time since then we have been served with orders extending the time within which the Sheriff of the City of New York must commence an action or special proceeding to reduce to his actual custody the personal property of the defendants capable of manual delivery, and to collect, receive and enforce all debts, effects and things in action of the defendant attached by the Sheriff in these two actions. Under

these orders the time has been extended to March 11, 1947, in one case and to April 22, 1947, in the [fol. 43] other case. The papers served on us in connection with such orders indicate that a judgment was entered in favor of the plaintiff against the Reichsbank in each case in 1942.

"As we have indicated in all of our discussions with your office regarding the vesting of Reichsbank accounts, in view of these attachments we believe that for our protection, and to avoid any appearance of acting in disregard or violation of the orders of the New York Court which issued the attachments, an appropriate court decree or order should be obtained authorizing or directing the Federal Reserve Bank of New York to turn over to the Alien Property Custodian property held by the Federal Reserve Bank of New York for the account of the Reichsbank.

"We have given some preliminary study to the question of what would be the appropriate procedure for obtaining such court decree or order, and tentatively it appears to us that the following procedures are available:

- (1) The Alien Property Custodian could make application in the attachment actions, under Sections 948 and 949 of the New York Civil Practice Act, for the vacation or modification of the attachments, as was done in the case of *Telkes v. Hungarian National Museum*; (New York Law Journal, May 24, 1943, page 2026.)
- (2) The Alien Property Custodian or the Federal Reserve Bank of New York could bring an action for a declaratory judgment, joining all interested parties as defendants.

[fol. 44] "There may be other appropriate methods of obtaining a court decree or order in a proceeding in which all interested parties would be joined, but the two proceedings just described appear to be the ones most obviously available. We shall be glad to discuss this question further with you and Mr. Worthington at any time, as to what type of proceeding may be preferable, or any other question in relation to the Reichsbank accounts."

As indicated in the foregoing we look forward to an opportunity to discuss this matter with you further. We would like to suggest also that it would be desirable to have other interested parties participate in such discussion. If a meeting is held in New York for discussion of this matter we shall of course be pleased to make a meeting place available in this bank.

Very truly yours, Walter S. Logan, Vice President
and General Counsel.

Enclosure.

[fol. 45] EXHIBIT B, ANNEXED TO RESPONSE

Federal Reserve Bank of New York

October 18, 1946.

Registered Mail

Alien Property Custodian, Washington 25, D. C.
Attention: Property Division

Your Reference: JEM:WJR:AFW: rf F-28-1282-C-3
V.O.No. 7794.

DEAR SIR:

In accordance with our letter to you dated today, signed by Mr. Walter S. Logan, Vice President and General Counsel, acknowledging the receipt of your letter of October 14, 1946, and its enclosures, we are forwarding to you herewith the checks described in Exhibit A attached to Vesting Order No. 7794.

Very truly yours, Peter P. Lang Manager, Foreign
Department.

Enclosures.

[fol. 46]

EXHIBIT C, ANNEXED TO RESPONSE.

	Key	Foreign Department
ALS Allotment of U. S. Securities	P/G	Purchase of Gold
A/P Acceptances Purchased	PMC	Proceeds of Maturing Coupons
ARP Acceptances Rec'd Against Payment	P/R	Payment(s) Received
C/C Cost of Cable(s)	PRG	Payment Received on Gold
D/P Draft(s) Paid	P/S	Proceeds of Securities
FXP Foreign Exchange Purchased	SDP	Securities Delivered Against Payment
FXS Foreign Exchange Sold	S/P	Securities Purchased
LCG Labor Costs on Gold	SRP	Securities Received Against Payment
OPE Out-of-Pocket Expenses	S/S	Securities Sold
P/A Proceeds of Maturing Acceptances	TRA	Transfer
P/C Proceeds of Collections	USC	Proceeds of U. S. Coin/Currency

Statement of
ReichsbankPeriod
June 1947

IN ACCOUNT WITH FEDERAL RESERVE BANK OF NEW YORK

Please Examine Statement of Account at Once Reporting
Any Discrepancies to the General Auditor Immediately.

Date	Description	Debits	Date	Description	Credits	Balance
				Balance Close 6/10/47		
				In Accounts Designated		
				Reichsbank	334,801.22	
				Reichsbank Special		
				Account	667,904.15	
				Reichsbank-Direktorium		
				Standstill Account 1938		
				No. 2	672.55	
				Reichsbank-Direktorium		
				Standstill Account 1938		
				No. 3	4.86	
				Total of Above Accounts		1,003,382.78
6/11	Attorney General of the United States, Washington, D. C., Account No. 28-18101	49,744.71				
6/11	Ditto	653,638.07				
				Balance Close 6/11/47		300,000.00

[fol. 47] EXHIBIT D, ANNEXED TO RESPONSE

The People of the State of New York to the Sheriff of
Any County of New York State:

Whereas an application has been made to the undersigned by the plaintiff, Leo Zittman, for a warrant of attachment against the property of the defendant, Reichsbank, and the defendant, Deutsche Golddiskontbank, and a summons having been duly issued in this action, and the plaintiff having satisfactorily shown by the affidavits of Leo Zittman, duly verified the 11th day of December, 1941, and of Rudolphe G. Maron, duly verified the 10th day of December, 1941, that the action is brought to recover for a sum of money only, as damages, for unjust enrichment, that a cause of action therefor exists against the defendant, Reichsbank, and in favor of the plaintiff for the sum of \$68,940, with accrued interest thereon, that a cause of action therefor exists against the defendant, Deutsche Golddiskontbank, and in favor of the plaintiff for the sum of \$40,230, with accrued interest thereon, and that the plaintiff is entitled to recover said sums over and above all counterclaims known to him, and it being further satisfactorily shown by said affidavits that said plaintiff is entitled to a warrant of attachment against the property of the defendants and each of them on the ground that the defendants are not residents of the State of New York, and the plaintiff having also given the undertaking required by law,

You are hereby commanded to attach and safely keep so much of the property within your County which the said defendant, Reichsbank, has or which it may have at any time before final judgment in this action as will satisfy the said plaintiff's demand of \$68,940, with accrued interest thereon and costs and expenses, and which the defendant, Deutsche Golddiskontbank, has or which it may have at any time before final judgment in this action [fo. 48] as will satisfy the said plaintiff's demand of \$40,230, with accrued interest thereon and costs and expenses, and that you proceed herein in the manner and make your return within the time required by law.

Witness, Hon. Charles J. Dodd, Justice of the Supreme Court of the State of New York, at the Court House, in

the Borough of Brooklyn, City of New York, on the 11th day of December, 1941.

Hon. Charles J. Dodd, Justice of the Supreme Court of the State of New York.

Katz & Sommerich, Attorneys for Plaintiff, Office & P. O. Address, 120 Broadway, Borough of Manhattan, City of New York.

(Clerk's Certificate omitted in printing.)

[fol. 49] EXHIBIT E, ANNEXED TO RESPONSE

The People of the State of New York to the Sheriff of the City of New York:

Whereas an application has been made to the undersigned by the plaintiff, John F. McCarthy, for a warrant of attachment against the property of the defendant, Reichsbank, and a summons having been duly issued in this action, and the plaintiff having satisfactorily shown by the affidavits of John F. McCarthy, duly verified the 20th day of January, 1942 and of Thomas H. Creighton, Jr., duly verified the 20th day of January, 1942, that the action is brought to recover a sum of money only for work, labor and services performed, and that a cause of action therefor exists against said defendant and in favor of the plaintiff for the sum of \$24,810, with interest thereon from May 30, 1939, and that the plaintiff is entitled to recover said sum over and above all counterclaims known to him, and it being further satisfactorily shown by said affidavits and the complaint that said plaintiff is entitled to a warrant of attachment against the property of the defendant, on the ground that the defendant is a foreign corporation and not a resident of the State of New York, and the plaintiff having also given the undertaking required by law,

Now, you are hereby commanded to attach and safely keep so much of the property within your County which the said defendant Reichsbank has or which it may have at any time before final judgment in this action as will satisfy the said plaintiff's demand of \$24,810, with accrued

interest thereon from May 30, 1939, and costs and expenses, and that you proceed herein in the manner and make your return within the time required by law.

[fol. 50] Witness, Hon. Meier Steinbrink, a Justice of the Supreme Court of the State of New York, at the Court House, in the Borough of Brooklyn, City of New York, the 21st day of January, 1942.

/s/ M. Steinbrink, Justice of the Supreme Court of the State of New York.

Katz & Sommerich, Attorneys for Plaintiff, Office & P. O. Address, 120 Broadway, Borough of Manhattan, City of New York.

(Clerk's Certificate omitted in printing.)

[fol. 51] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

ANSWER OF RESPONDENT JOHN F. MCCARTHY

The respondent, John F. McCarthy, answering the petition herein:

1. Admits the allegations contained in paragraphs thereof numbered 1-3 inclusive, 5 and 11-15 inclusive.

2. Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 thereof.

3. Admits the allegations contained in paragraph 6 thereof that (a) for some time prior to December 7, 1941 the Deutsche Reichsbank, the Central Bank of Germany, a non-resident of the State of New York, maintained four deposit accounts with respondent Federal Reserve Bank of New York; (b) with the application of the "freezing" controls of Executive Order No. 8389 to nationals of Germany by Executive Order No. 8785, effective June 14, 1941, these accounts became "blocked" and transactions relating thereto were forbidden except as authorized by the Secretary of the Treasury; and (c) the balances in the Reichsbank accounts totalled \$862,469.61 on December 11, 1941 and \$953,683.07 on January 21, 1942, and, except

as specifically admitted herein, denies each and every other allegation contained in said paragraph.

4. Admits the allegations contained in paragraph 7 thereof that (a) on or about December 11, 1941, respondent Leo Zittman commenced an action in the Supreme Court of the State of New York, Kings County, against Deutsche Reichsbank (Action No. 16183-1941); (b) pursuant to a warrant of attachment procured by the respondent Zitt-[fol. 32] man, the Sheriff of the County of New York, then Daniel E. Finn, Jr., on or about December 11, 1941 levied upon said accounts of Deutsche Reichsbank by serving a certified copy of a warrant of attachment upon the respondent Federal Reserve Bank of New York, and (c) thereafter on March 27, 1942 and following the service by publication and mailing of the summons in said action, judgment by default for \$94,609.37 in favor of respondent Zittman was entered against the Reichsbank, and, except as expressly admitted herein, denies each and every other allegation contained in said paragraph.

5. Admits the allegations contained in paragraph 8 thereof that a license was never obtained authorizing respondent Federal Reserve Bank to pay the said judgment out of said "blocked" accounts, and that to date no execution has been had on the judgment, and, except as expressly admitted herein, denies each and every other allegation contained in said paragraph.

6. Admits the allegations contained in Paragraph 9 thereof that (a) on or about January 20, 1942, respondent John F. McCarthy commenced an action in the Supreme Court of the State of New York, Kings County, against Deutsche Reichsbank (Action 719-1942); (b) pursuant to a warrant of attachment procured by respondent McCarthy, the Sheriff of the City of New York, respondent John J. McCloskey, Jr., on or about January 21, 1942 levied upon said accounts of Deutsche Reichsbank by serving a certified copy of the warrant of attachment upon the respondent Federal Reserve Bank of New York, and (c) publication and mailing of the summons in said action, thereafter, on April 24, 1942 and following the service by judgment by default for \$29,660.21 in favor of the respondent McCarthy was entered and, except as expressly

admitted herein, denies each and every other allegation contained in said paragraph.

[fol. 53] 7. Admits the allegations contained in paragraph 10 thereof that (a) on May 29, 1942, the Foreign Funds Control of the United States Treasury Department denied Application No. NY-401383 of respondent McCarthy dated April 25, 1942 for a license authorizing respondent Federal Reserve Bank of New York to pay the said judgment out of the "blocked" accounts, and (b) that a license was never obtained to authorize respondent Federal Reserve Bank to pay the said judgment out of the "blocked" accounts and to date no execution has been had on the judgment and, except as expressly admitted herein, denies each and every other allegation contained in said paragraph.

First Defense

8. In the action commenced by the respondent McCarthy, a resident citizen of the United States, as plaintiff, against Reichsbank, as defendant, in the New York Supreme Court, Kings County, by the filing of the summons and complaint therein in the office of the Clerk of Kings County, New York, on January 21, 1942, McCarthy, as assignee, sought to recover the sum of \$24,810.00 with interest thereon from May 30, 1939 for legal work, labor and services rendered the said Reichsbank at its special instance and request by Frank W. Mondell, who was a member of the 54th (1895-97) and 56th to 67th Congresses (1899-1923), majority floor leader in the 66th and 67th Congresses and Director of the War Finance Corporation (1923-25) and who died on or about August 6, 1939, a resident of the District of Columbia, leaving a Last Will and Testament which was duly probated by the United States District Court for the District of Columbia and upon which Letters of Administration with the Will annexed were duly issued and granted by the said United States District Court to William H. Mondell appointing him Administrator with the Will annexed [fol. 54] of the goods, chattels and credits which were of said Frank W. Mondell, and said William H. Mondell, who thereupon duly qualified and acted as such Administrator with the Will annexed, duly assigned said claim against the Reichsbank to the respondent McCarthy.

9. In said action a warrant of attachment was duly

issued on January 21, 1942 to the Sheriff of the City of New York who, pursuant to the direction contained in said warrant, levied upon the accounts of the Reichsbank with the Federal Reserve Bank of New York, among others, by serving a certified copy of said warrant of attachment upon said Federal Reserve Bank, and upon February 17, 1942, the New York Supreme Court, Kings County, made an order directing service of the summons in said action upon Reichsbank by publication, which order further provided that the mailing of a copy of the summons and complaint and said order for service of summons by publication and the notice required by Rule 52 of the New York Rules of Civil Practice to said Reichsbank as required by Rule 50 of said Rules be dispensed with and that a copy of each thereof be mailed to the Attorney General of the United States on behalf of said Reichsbank.

10. On February 17, 1942 the United States was at war with Germany, and said Reichsbank was a foreign corporation having its office in, and it was a national of, Germany, and Rule 50 of the New York Rules of Civil Practice then provided that in such case the order of the Court for service of the summons by publication may dispense with the mailing of any papers to the defendant and, in lieu thereof, shall direct that the papers be mailed to such officer as may have been appointed by the President of the United States to take possession of the property of alien enemies directed to him at Washington, District of Columbia, on behalf of such defendant.

[fol. 55] 11. The officer contemplated by said Rule 50 as it existed prior to its amendment on March 16, 1942 was the officer whom the President was authorized to appoint pursuant to Section 6 of the Trading with the Enemy Act of October 6, 1917 (40 Stat. 415; U. S. Code, Title 50 Appendix, Section 6) and by said statute the President was authorized to appoint an official to be known as the Alien Property Custodian with power to receive all money and property in the United States due or belonging to any enemy or ally of an enemy which may be paid, conveyed, transferred, assigned or delivered to said Custodian under the provisions of said act.

12. By an Executive Order No. 6694 made and issued by the President on May 1, 1934, which became effective

on July 1, 1934, the office of the Alien Property Custodian was abolished and ceased to exist and all the authority, rights, privileges, powers and duties conferred and imposed on said official by law were transferred to the Department of Justice to be administered under the supervision of the Attorney General and said Executive Order was in full force and effect on February 17, 1942 when the order for publication of the summons in said action of the respondent McCarthy against Reichsbank was issued.

13. Publication of the summons in said action was made in accordance with the terms of said order for service by publication, dated February 17, 1942 and copies of the summons and complaint in said action, the order for service of the summons by publication and notice required by Rule 52 of the New York Rules of Civil Practice were mailed on February 18, 1942 addressed to the Attorney General of the United States, at Washington, D. C. and under date of February 25, 1942, the Attorney General of the United States acknowledged receipt thereof.

[fol. 56] 14. The Attorney General of the United States made no appearance and took no steps in said action and permitted judgment to be taken and entered therein in favor of respondent McCarthy against Reichsbank on April 24, 1942 for \$29,680.21, and by reason thereof the then Attorney General of the United States acquiesced in the taking and entry of said judgment and consented thereto.

Second Defense

15. Repeats and reiterates each and every allegation contained in paragraphs hereof numbered 8-14 inclusive with the same force and effect as if fully set forth at length herein.

16. The acquiescence in the taking and entry of said judgment and consent thereto of the then Attorney General of the United States is binding upon the petitioner herein, and by reason thereof petitioner is estopped from questioning the validity of the proceedings in said action of McCarthy against Reichsbank in the New York Supreme Court, Kings County, and the judgment entered therein.

Third Defense

17. From the inception of the "freezing" control, and on January 21, 1942 when the warrant of attachment was issued in the aforesaid action of McCarthy against Reichsbank and the levy made thereunder upon the accounts of the Reichsbank with the Federal Reserve Bank of New York, the commencement of actions in the courts of the United States or any of the States against blocked nationals and the issuance of warrants of attachment against funds belonging to blocked nationals and levies thereunder were authorized by the United States Treasury Department, which was empowered by Executive Order No. 8389, [fol. 57] as amended, to administer the "freezing" control thereunder, and said Treasury Department merely required that a license be secured before payment to satisfy any judgment could be made from any blocked account affected by said Executive Order, and by reason thereof the commencement of the aforesaid action of McCarthy against Reichsbank, the issuance of the warrant of attachment therein and levy made thereunder on January 21, 1942, were authorized by the United States Treasury Department.

Fourth Defense

18. Repeats and reiterates each and every allegation contained in paragraph 17 hereof with the same force and effect as if fully set forth at length herein.

19. Said authorization of the United States Treasury Department is binding upon the petitioner herein and by reason thereof petitioner is estopped from questioning the validity of the proceedings in said action of McCarthy against Reichsbank in the New York Supreme Court, Kings County, and the judgment entered therein.

Fifth Defense

20. General Ruling No. 12 issued on April 21, 1942 by the Secretary of the Treasury in connection with the administration of the "freezing" control under Executive Order No. 8389, as amended, acted as a license validating the issuance of the warrant of attachment in the aforesaid action of McCarthy against Reichsbank, the levy made thereunder upon the accounts of the Reichsbank with the

Federal Reserve Bank of New York on January 21, 1942, the judgment recovered by the respondent McCarthy in said action against the Reichsbank on April 24, 1942, and [fol. 58] the transfer thereby to the respondent McCarthy of the attributes of property interest in said accounts except payment.

Sixth Defense

21. Repeats and reiterates each and every allegation contained in paragraph 20 hereof with the same force and effect as if fully set forth at length herein.

22. Said General Ruling No. 12 is binding upon the petitioner herein and by reason thereof petitioner is estopped from questioning the validity of the proceedings in said action of McCarthy against Reichsbank in the New York Supreme Court, Kings County, and the judgment entered therein.

Seventh Defense

23. Under the laws of the State of New York a lien for the security of his demand against the Reichsbank was created in favor of the respondent McCarthy upon the accounts of the Reichsbank with the Federal Reserve Bank of New York on January 21, 1942, when the levy was made under the warrant of attachment issued by the New York Supreme Court, Kings County, and the rights or interest, if any, of the petitioner in said accounts by virtue of and under Vesting Order No. 7794 and the Turnover Directive of October 14, 1946 and the letter of the same date of the then Alien Property Custodian addressed to the respondent Federal Reserve Bank of New York are subject to said attachment and said lien.

Eighth Defense

24. The service of a certified copy of the warrant of attachment issued by the New York Supreme Court, Kings [fol. 59] County, in the action of McCarthy against Reichsbank by the Sheriff of the City of New York on January 21, 1942 on the respondent Federal Reserve Bank of New York made the accounts of the Reichsbank with the Federal Reserve Bank of New York the subject of that litigation and brought said accounts under the jurisdiction and control of the New York Supreme Court, Kings County,

and the United States District Courts have no jurisdiction to interfere with or nullify said jurisdiction and control of said property by the New York Supreme Court, Kings County.

Ninth Defense

25. The action in the New York Supreme Court, Kings County, instituted by the respondent McCarthy against Reichsbank, was a proceeding *in rem* and subjected the accounts of the Reichsbank with the respondent Federal Reserve Bank of New York, which were levied upon and attached by the Sheriff of the City of New York on January 21, 1942, to the payment of the judgment recovered by the respondent McCarthy in said action against the Reichsbank on April 24, 1942 with interest.

Tenth Defense

26. The judgment entered on April 24, 1942 in favor of the respondent McCarthy against the Reichsbank in the action in the New York Supreme Court, Kings County, is a judgment *in rem* and is binding upon all the world, including the petitioner herein, with respect to the accounts of the Reichsbank with the respondent Federal Reserve Bank of New York levied upon on January 21, 1942 by the Sheriff of the City of New York, by the service of a certified copy of the warrant of attachment issued in that action.

[fol. 60]

Eleventh Defense

27. Respondent McCarthy is a citizen of the United States and is entitled under Section 8 of the Trading with the Enemy Act (40 Stat. 418; United States Code, Title 50, Appendix, Section 8) to continue to have his lien for the security of his judgment against the Reichsbank created in his favor upon the accounts of the Reichsbank with the Federal Reserve Bank of New York on January 21, 1942 by the service by the Sheriff of the City of New York of a certified copy of the warrant of attachment issued in the action in the New York Supreme Court, Kings County, and to enforce said lien, realize thereon, and satisfy the judgment recovered by him against the Reichsbank out of the said attached accounts.

Twelfth Defense

28. The service by the Sheriff of the City of New York upon the Federal Reserve Bank of New York on January 21, 1942 of a certified copy of the warrant of attachment issued by the New York Supreme Court, Kings County, in the action in that Court of the respondent McCarthy against Reichsbank enjoined and forbade the Federal Reserve Bank of New York to make or suffer any transfer or other disposition of or interfere with the accounts of the Reichsbank with the Federal Reserve Bank of New York so levied upon to any person or persons, including the petitioner herein, other than the said Sheriff, except upon the direction of the said Sheriff, or pursuant to an order of the New York Supreme Court, and such injunction is still in full force and effect.

[fol. 61]

Thirteenth Defense

29. The Treasury Department has in the administration of the "freezing" control under Executive Order 8389, as amended, recognized attachments as valid and creating liens upon blocked accounts without first procuring a particular license therefor by issuing licenses after recovery of judgment authorizing payment out of the attached accounts in satisfaction of the judgment.

30. That such practice of the Treasury Department is binding upon the petitioner herein and by reason thereof, petitioner is estopped from questioning the validity of the proceedings in said action of McCarthy against Reichsbank in the New York Supreme Court, Kings County, and the judgment entered therein.

Fourteenth Defense

31. Upon information and belief, that since the inception of the "freezing" control the Alien Property Custodian has recognized the validity of an attachment against blocked accounts of an enemy of the United States and the prior right of property therein of the judgment creditor by payment of the judgment out of the enemy judgment-debtor's assets taken over by the Alien Property Custodian under a Vesting Order notwithstanding the judgment creditor had not procured a particular license

authorizing the attachment and entry of judgment since the inception of the "freezing" control, and by reason thereof the petitioner herein is estopped from questioning the validity of the proceedings in said action in McCarthy against Reichsbank in the New York Supreme Court, Kings County, the judgment entered therein and the prior right of property of McCarthy in the attached accounts of the Reichsbank with the Federal Reserve Bank of New York.

[fol. 62] Wherefore, the respondent McCarthy prays that the petition herein be dismissed, together with the costs and disbursements of this action.

Katz & Sommerich, By Henry I. Fillman, A member of the firm, Attorneys for respondent, John F. McCarthy, Office and Post Office Address, 120 Broadway, New York 5, N. Y.

(Verified by John F. McCarthy, Feb. 5, 1948.)

[fol. 63] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

ANSWER OF RESPONDENT LEO ZITTMAN

The respondent, Leo Zittman, for his response to the Order to Show Cause herein, dated January 23, 1948, and for his answer to the petition herein, on information and belief,

1. Admits the allegations of fact contained in the paragraphs of the petition herein, numbered 1 to 5 inclusive, 8, 9 and 11 to 15, inclusive.

2. Alleges that he is without knowledge or information sufficient to form a belief as to each and every allegation contained in the paragraph of the petition herein, numbered 10.

3. Admits the allegations contained in the paragraph of the petition herein, numbered 6, except that this respondent denies that application of the "freezing" Controls of Executive Order No. 8389 as extended by Execu-

tive Order No. 8785, prohibited the transfer of any interest in the accounts therein described, maintained with the respondent, Federal Reserve Bank of New York and denies that transactions relating thereto were forbidden except as specifically authorized by the Secretary of the Treasury.

4. Admits the allegations contained in the paragraph of the petition herein, numbered 7, except that this respondent alleges that the action commenced by him in the Supreme Court of the State of New York, Kings County, against Deutsche Reichsbank and Deutsche Golddiskontbank, defendants (action No. 16183-1941) was begun on December 11, 1947 and on no other day and that a levy [fol. 64] pursuant to the warrant of attachment procured by this respondent in said action, was duly made by the then Sheriff of the County of New York on December 11, 1941 at 2:20 P. M. on the accounts maintained by the Deutsche Reichsbank with the Federal Reserve Bank of New York.

By way of further defense to the petition herein, respondent, Leo Zittman, says:

5. That, in the action begun by this respondent, a resident citizen of the United States, as plaintiff, against Reichsbank and Deutsche Golddiskontbank, as defendants (Cause No. 16183-1941) in the Supreme Court of the State of New York, Kings County, by the filing of the summons therein in the office of the Clerk of Kings County, New York, on December 11, 1941, this respondent sought to recover the sum of \$68,940 with interest thereon from July 2, 1937, from the Reichsbank and the sum of \$40,230 with interest thereon from July 2, 1937 from Deutsche Golddiskontbank for unjust enrichment upon a cause of action therefor which arose on July 2, 1937 and that such action was brought for the benefit of a person within the United States not an enemy or ally of enemy of the United States.

6. That, in said action, a warrant of attachment was duly issued on December 11, 1941 to the Sheriff of the County of New York who, pursuant to the direction contained in said warrant levied upon the funds, credits and property of the Reichsbank maintained with, and held by the respondent, Federal Reserve Bank of New York, among

others, by serving a certified copy of said warrant of attachment upon said Federal Reserve Bank of New York on December 11, 1941 at 2:20 o'clock P. M.; that, at the time of the service of the said warrant of attachment, the said Federal Reserve Bank of New York, as acknowledged by it, held property of, and was indebted to, the [fol. 65] said Reichsbank in the sum of \$862,469.61 and that, on January 21, 1942, the said Federal Reserve Bank of New York was indebted to the Reichsbank in the sum of \$953,683.07; and that all of said funds credits and property in the amount of \$862,469.61 were received and held by the said Federal Reserve Bank of New York prior to the commencement of the War with Germany.

7. That, in said action and on December 31, 1941, the Supreme Court of the State of New York, Kings County, made an order directing service of the summons in said action upon Reichsbank and Golddiskontbank by publication, which order further provided that the mailing of a copy of the summons and complaint and said order for service of summons by publication and the notice required by Rule 52 of the New York Rules of Civil Practice to said Reichsbank and Deutsche Golddiskontbank as required by Rule 50 of said Rules be dispensed with and that a copy of each thereof be mailed to the Attorney General of the United States on behalf of said Reichsbank and said Deutsche Golddiskontbank; and that the said Reichsbank and said Deutsche Golddiskontbank were non-residents of the State of New York and were foreign corporations which had offices and places of business in, and were nationals of, Germany.

8. That publication of the summons in said action was made in accordance with the terms of said order for service by publication, dated December 31, 1941; and copies of the summons and complaint in said action, the order for service of the summons by publication and notice required by Rule 52 of the New York Rules of Civil Practice were duly and regularly mailed, addressed to the Attorney General of the United States, at Washington, D. C., and, that the Attorney General of the United States acknowledged receipt thereof.

[fol. 66] 9. That the Attorney General of the United States made no appearance and took no steps in said action

and, accordingly, judgment was taken and entered in said action on March 27, 1942, in favor of this respondent against the Reichsbank for \$92,655.28 and against the Deutsche Golddiskontbank for \$54,069.12 and against Reichsbank and Deutsche Golddiskontbank, jointly and severally, for \$1,954.09 costs and disbursements as taxed; that the Attorney General acquiesced in the said action and the proceedings and judgments had therein; and that such acquiescence is binding on the petitioner and he is estopped thereby.

10. That, upon the service of the said warrants of attachment in said action upon the Federal Reserve Bank of New York, the latter, by virtue of Section 917 of the New York Civil Practice Act, was "forbidden to make or suffer, any transfer or other disposition of, or interfere with any such property or interest therein so levied upon, or pay over or otherwise dispose of any debt so levied upon, or sell, assign or transfer any right so levied upon, to any person, or persons, other than the Sheriff serving the said warrant until ninety days from the date of such service, except upon direction of the sheriff or pursuant to an order of the court," which injunction is still in full force and effect.

11. That transfer of attached funds or property contrary to Section 917 of the New York Civil Practice Act constitutes under the law of New York a civil contempt of court, punishable by fine and imprisonment, or either.

12. Under Section 922 of the New York Civil Practice Act, the Sheriff may be required to commence, within ninety days of service of the certified copy of the warrant of attachment, an action or special proceeding to reduce to his actual custody the property attached, but such section further provides:

[fol. 67] "The time within which such action or special proceeding, as hereinbefore provided, may be commenced shall be extended beyond the period of ninety days from the date of the service of the said warrant only by order of the court for good cause shown. * * *

An order thus extending the time within which such an action or special proceeding may be commenced shall be effective to continue all duties and liabilities of any person on whom a warrant of attachment in the action

has been served, provided that a certified copy of the said order is served upon said person prior to the expiration of the said ninety days, or prior to the expiration of the time for commencing such an action or special proceeding as further extended."

13. From time to time and in accordance with the provisions of Section 922 of the New York Civil Practice Act, orders have been duly and regularly made in said action by the Supreme Court of the State of New York, Kings County, and have been duly and regularly entered and served, as prescribed by Section 922 of the New York Civil Practice Act, duly extending the time within which the Sheriff of the City of New York might commence an action or special proceeding prescribed in said Section 922, to collect, receive and enforce the debts, effects, things in action and property attached by him and that, by an order so made by said Court and entered on January 27, 1948, and duly served on the Federal Reserve Bank of New York on January 29, 1948, such time has been so extended to March 11, 1949.

14. That the warrant of attachment in said action brought by this respondent has never been vacated or modified nor has the attachment thereunder been released, discharged or otherwise annulled and that, by virtue of such attachment, this respondent has acquired a lien against, [fol. 68] and an interest and property right, in the funds, credits and property so attached and is entitled to require the same to be applied to the satisfaction of the judgments obtained by this respondent in his said action against the Reichsbank and that such lien, interest and property right of this respondent are prior and superior to the rights claimed by the petitioner in this action.

15. That, by virtue of the service of a certified copy of the warrant of attachment granted by the Supreme Court of the State New York, County of Kings, in the said action brought by this respondent by the Sheriff of New York County on December 11, 1941 on the respondent, Federal Reserve Bank of New York, the said Supreme Court of the State of New York acquired sole and exclusive jurisdiction and control of, and dominion over, the funds, credits and property attached and that the United States

District Courts have no jurisdiction or power to adjudicate with respect to, interfere with, or exercise authority or control over, such funds, credits or property or the jurisdiction and control of, and dominion over, the same acquired by and vested in the said Supreme Court of the State of New York.

16. That this respondent is a citizen of the United States and is entitled, under Section 8 of the Trading with the Enemy Act (40 Stat. 418; U. S. Code Title 50, Appendix, Section 8) to continue to have and enjoy his lien and security right in the funds, credits and property of the Reichsbank in the hands of the Federal Reserve Bank of New York which was effected by the service of the said certified copy of warrant of attachment on the Federal Reserve Bank on December 11, 1941 and to enforce such lien and security right, realize thereon, and satisfy the said judgments recovered by him against the Reichsbank out of the funds, credits and property so attached.

[fol. 69] 17. That the Treasury Department of the United States, in the administration of the "freezing" controls under Executive Order 8389, as amended, has recognized, consented to, and acquiesced in, unlicensed attachments against, and other judicial seizure of, blocked accounts as valid and effective and as creating valid and enforceable liens against such accounts and has issued licenses authorizing payment out of such blocked accounts in satisfaction of judgments obtained in actions begun by or involving such attachment against, or other judicial seizure of, such blocked accounts and that, by reason thereof, petitioner is estopped from questioning the validity or effect of the proceedings had in the said action brought by this petitioner and the judgment entered therein.

18. That, since the inception of "freezing" controls the Alien Property Custodian has recognized and acquiesced in the validity of attachments against blocked accounts of enemies of the United States and of the lien and superior right of the attaching creditor by making payment of judgments secured in attachment proceedings out of the enemy judgment-debtor's assets acquired by the Alien Property Custodian under a Vesting Order, notwithstanding that the attaching creditor had not procured a particular license authorizing the attachment and entry of

judgment and, by reason thereof, petitioner herein is estopped from impugning the validity of the proceedings had in the said action brought by this respondent against the Reichsbank and the Deutsche Golddiskontbank in the Supreme Court of the State of New York, County of Kings, the judgment entered therein and the prior lien and interest secured by this petitioner in the attached funds, credits and property in the hands of the respondent, the Federal Reserve Bank of New York.

19. That the Treasury Department of the United States, which was empowered to administer the "freezing" control [fol. 70] under Executive Order 8389, as amended, did, on December 11, 1941 and prior and subsequent thereto, authorize, acquiesce in and ratify the commencement of suits against blocked Nationals and the attachment, or other judicial seizure of funds, credits and property belonging to blocked Nationals; that, accordingly, the aforesaid action brought by this respondent against the Reichsbank and the Deutsche Golddiskontbank and the proceedings had therein were authorized, ratified and acquiesced in by the said Treasury Department; and that such authorization, acquiescence and ratification are binding on the petitioner and he is estopped thereby.

20. That a lien against, and property interest in, the funds, credits and property of the Reichsbank maintained with the Federal Reserve Bank of New York arose in favor of this respondent when the same were levied upon in the said action, pursuant to the warrant of attachment granted by the Supreme Court of the State of New York, County of Kings, and such lien and property interest are superior to the interest of the petitioner, if any, in said funds, credits and property and, accordingly, that this respondent is entitled to require that said funds, credits and property be applied to the satisfaction of his said judgment.

21. That the said judgment, entered in favor of this respondent on March 27, 1942, against the Reichsbank and the Deutsche Golddiskontbank in the said action in the Supreme Court of the State of New York, County of Kings, is a judgment *in rem* and is binding upon the said funds, credits and property levied upon, as aforesaid on December 11, 1941, as against the whole world, including the petitioner.

[fol. 71] 22. That the order prayed for by the petitioner, if granted wholly or in part, would contravene and deny to this respondent rights guaranteed to him by the Constitution of the United States.

Wherefore, the respondent, Zittman, prays that the petition herein be dismissed.

Joseph M. Cohen, Attorney for Respondent, Leo Zittman, 36 West 44th Street, New York 18, N. Y.

(Verified by Joseph M. Cohen, Feb. 24, 1948.)

[fol. 72] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AMENDED ANSWER OF RESPONDENT JOHN J. McCLOSKEY

The respondent, John J. McCloskey, as Sheriff of the City of New York, for his amended answer to the petition herein respectfully alleges:

1. The respondent Sheriff of the City of New York adopts as his answer the allegations contained in the answers to the petition herein respectively submitted by the respondents Leo Zittman and John F. McCarthy, said allegations being incorporated herein by reference with the same force and effect as if fully set forth at length herein.

Wherefore, the respondent Sheriff of the City of New York prays:

1. That the petition herein be dismissed.
2. That if the Court determines that the petitioner is entitled to possession of the property attached by the Sheriff pursuant to the Zittman and McCarthy attachments any decree to be entered thereon should provide for the payment of the Sheriff's statutory poundage fees arising from said attachments and for such other and further relief as the Court may deem just.

Sidney Posner, Attorney for Respondent John J. McCloskey, as Sheriff of the City of New York, Office and P. O. Address, 31 Chambers Street, New York 7, N. Y.

(Sworn to by H. William Kehl, Feb. 27, 1948.)

[fol. 73] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

TOM C. CLARK, Attorney General, as successor to the Alien
Property Custodian, Petitioner,

v.

FEDERAL RESERVE BANK OF NEW YORK, ET AL., Respondents
TOM C. CLARK, Attorney General, as successor to the Alien
Property Custodian, Petitioner,

v.

CHASE NATIONAL BANK OF THE CITY OF NEW YORK, ET AL.,
Respondents

STIPULATION

For the purposes of these causes, it is hereby Stipulated and Agreed as follows by and among the parties hereto, through their attorneys, subject to any objection with respect to materiality or relevancy which may hereafter be made by any party:

1. The motions of the respondent McCarthy for an order striking from the motion calendar petitioner's applications, for relief and directing that any and all further proceedings herein proceed in accordance with the procedure laid down in the Federal Rules of Civil Procedure be and the same hereby are withdrawn.

[fol. 74] 2. The following document, a photostatic copy of which is attached to this stipulation and marked Exhibit "A," is genuine, and the facts stated therein are true:

Letter, dated February 25, 1942, from the Attorney General of the United States, signed for him by Francis J. McNamara, Special Assistant to the Attorney General, Alien Property Division, addressed to Messrs. Katz & Sommerich.

3. On January 7, 1942, respondent Zittman caused to be mailed to the Attorney General of the United States at Washington, D. C., a copy of the summons and complaint in the action brought by Zittman in the Supreme Court of

the state of New York for the County of Kings against the Deutsche Reichsbank and the Deutsche Golddiskontbank, together with the notice and the order for service of summons by publication made in such action required by Rule 52 of the New York Rules of Civil Practice to be mailed to the Attorney General. Thereafter the Attorney General acknowledged receipt of said papers.

4. The following letter was sent on June 14, 1941, by Mr. D. W. Bell, Acting Secretary of the Treasury, to Mr. Januss Zoltowski, Financial Counsellor to the Polish Embassy, 14 Wall Street, New York, N. Y., and that the statements made therein reflected the policy of the Treasury Department:

Treasury Department,
Washington, June 14, 1941

Re: Commission for Polish Relief, Ltd. v. Banca Nazionale A. Romaniei.

Dear Sir: Reference is made to your conference on June 6, 1941, with representatives of this Department relative to the above case and Executive Order No. 8389, as amended.

[fol. 75] This will confirm the advice furnished to you at such conference that in administering Executive Order No. 8389, as amended and the regulations issued thereunder, the Treasury Department does not attempt to limit the bringing of suits in the courts of the United States, or of any of the states. However, in no event may any payment be made from any blocked account affected by such Executive Order except pursuant to a license authorizing such action.

Very truly yours, D. W. Bell, Acting Secretary of the Treasury.

Mr. Januss Zoltowski, Financial Counsellor to the Polish Embassy, 14 Wall Street, New York, N. Y.

5. From the inception of "freezing" controls, all litigants who, prior to commencing attachment actions against funds belonging to blocked nationals, had requested the Secretary of the Treasury to license an attachment, or levy, received

from the Treasury Department a response of the following nature:

Under Executive Order No. 8389, as amended, and the Regulations issued thereunder, no attempt is made to limit the bringing of suits in the courts of the United States or of any of the States. However, should you secure a judgment against one of the parties referred to in your letter, which is a country covered by the Order, or a national thereof, a license would have to be secured before payment could be made from accounts in banking institutions within the United States in the name of such country or national.

[fol. 76] 6. From the inception of "freezing" controls, the Secretary of the Treasury in administering the "freezing" control program adopted the position, in response to numerous requests made of him, that the bringing of an action, the issuance of a warrant of attachment therein, and the levy thereunder upon blocked property found within the jurisdiction of the court which issued the warrant were not forbidden but that a license was required to be secured before payment could be made from the blocked account to satisfy any judgment recovered in such action.

7. The Treasury Department has at various times issued licenses authorizing payment out of a blocked account of a blocked national for the purpose of making payment on a judgment recovered in an action where a prior warrant of attachment was issued and levied upon the blocked account of a blocked national therein notwithstanding that a particular license to institute the action and levy the attachment was not procured by a plaintiff and judgment-creditor. A license to institute the action and levy the attachment was in fact not required by the Treasury Department.

8. Following a judgment obtained by one Metallo-Chemical Corporation against a blocked national in an action in a New York court where a warrant of attachment was issued and levied upon a blocked account without first procuring from the Treasury Department a license to institute the action and to procure and levy the warrant of attachment therein, the Treasury Department issued license No. NY-

704109-T, a copy of which is attached hereto and marked Exhibit "B."

9. On December 22, 1941, without license from the Treasury Department, a warrant of attachment was issued in an action in a New York State court instituted by Murray Oil Products Co., Inc., against Mitsui & Co., Ltd., the [fol. 77] bank balances of Mitsui & Co., Ltd., with the National City Bank and Chase National Bank were attached pursuant to the warrant of attachment and a judgment was thereafter entered in favor of Murray Oil Products Co. against the debtor Mitsui & Co., Ltd. A license authorizing the issuance of the attachment was in fact not required by the Treasury Department. After the then Alien Property Custodian had issued, on August 17, 1942, Vesting Order No. 105 vesting in himself title to all property and assets of Mitsui & Co., Ltd., in the United States, and after the judgment became final, the Alien Property Custodian paid to the judgment-creditor an amount sufficient to satisfy the judgment.

10. In the plenary action brought by the respondent Zittman in the Supreme Court of the State of New York for the County of Kings against the Deutsche Reichsbank and the Deutsche Golddiskontbank, a certified copy of the warrant of attachment was served upon the Chase National Bank of the City of New York on December 11, 1941 at 2:41 o'clock P. M. Eastern Standard Time and on the Federal Reserve Bank of New York on December 11, 1941 at 2:20 o'clock P. M. Eastern Standard Time. The funds, credits and property against which said warrants of attachment were levied had been received and held by the respondents Chase National Bank and Federal Reserve Bank of New York prior to the commencement of the war with Germany.

11. The Attorney General of the United States did not appear and did not take any steps in the actions brought by respondents McCarthy and Zittman in the Supreme [fol. 78] Court of the State of New York for Kings County in which the warrants of attachment were issued.

Katz & Sommerich, Counsel for Respondent McCarthy, By: Henry I. Fillman; Joseph M. Cohen, Counsel for Respondent Zittman, John F. X. McGohey, United States Attorney, Counsel for Tom C. Clark,

Attorney General, Petitioner, By Lawrence H. Axman, Assistant United States Attorney, Thomas E. Harris.

[fol. 79] EXHIBIT A, ANNEXED TO STIPULATION

Department of Justice, Washington, D. C. msm
February 25, 1942

Address reply to "The Attorney General" and refer to initials and number FJMcN: JWC Jr. 9-100-017-268. Messrs. Katz & Sommerich, 120 Broadway, New York, New York.

Sirs:

This Department has received the following papers in the case of John F. McCarthy, plaintiff, against Reichsbank, defendant, now pending in the Supreme Court, Kings County, New York:

- (1) Notice pursuant to Rule 52 of the Rules of Civil Practice of New York;
- (2) Summons;
- (3) Complaint;
- (4) Affidavit in support of application for order of publication, with exhibits; and
- (5) Order for service of summons by publication.

[fol. 80] These papers were enclosed, without accompanying letter, in an envelope bearing your name and address, directed to the Attorney General of the United States.

Respectfully, For the Attorney General, Francis J. McNamara, Special Assistant to the Attorney General, Alien Property Division.

EXHIBIT B, ANNEXED TO STIPULATION

Treasury Department, Foreign Funds Control.

License No. N. Y. 704109-T, Date July 21, 1945.

License (Granted Under the Authority of Executive Order No. 8389 of April 10, 1940, as Amended, and the Regulations and Rulings Issued Thereunder).

To Gunther Jacobson (G.J. 7), Name of Licensee, 36 West 44th Street, New York 18, New York, Address of Licensee.

Sirs:

1. Pursuant to your application of June 11, 1945, the following transaction is hereby licensed:

The Irving Trust Company, New York City is hereby authorized to charge the account of Banque Transatlantique in Paris, France, \$3,705.44, plus interest, and pay that amount to the Sheriff of the City of New York, pursuant to the judgment obtained by Metallo-Chemical Corporation against Banque Transatlantique in Paris, France, dated April 23, 1941 to pay out the above funds as follows:

- (1) To himself for fees;
- (2) Balance to a domestic bank for credit to the blocked account of Metallo-Chemical Corporation.

2. This license is granted upon the statements and representations made in your application, or otherwise filed with or made to the Treasury Department as a supplement to your application, and is subject to the conditions, among others, that you will comply in all respects with Executive Order No. 8389 of April 10, 1940, as amended, the Regulations and Rulings issued thereunder and the terms of this license.

3. The licensee shall furnish and make available for inspection any relevant information, records or reports requested by the Secretary of the Treasury, the Federal Reserve Bank through which the license was issued, the Postmaster at the place of mailing or the Collector of Customs at the port of exportation.

4. This license expires 30 days from the date of its issuance, is not transferable, is subject to the provisions of Executive Order No. 8389 of April 10, 1940, as amended, and the Regulations and Rulings issued thereunder and may be revoked or modified at any time in the discretion of the Secretary of the Treasury acting directly or through the agency through which the license was issued, or any other agency designated by the Secretary of the Treasury. If this license was issued as a result of willful misrepresentation [fol. 82] on the part of the applicant or his duly authorized agent, it may, in the discretion of the Secretary of the Treasury, be declared void from the date of its issuance, or from any other date.

Issued by direction and on behalf of the Secretary of the Treasury:

Federal Reserve Bank of New York, By (Illegible):

The Act of October 6, 1917, as amended, provides in part as follows:

“ * * * Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than \$10,000, or, if a natural person, may be imprisoned for not more than ten years or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine; imprisonment or both.”

Note: If this license covers gold in any form the provisions of the Provisional Regulations issued under the Gold Reserve Act of 1934 must also be complied with. Original.

[fol. 83] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

OPINION BY BONDY, D. J.

Honorable John F. X. McGohey, by Laurence H. Axman, Esq. Tom E. Harris, Esq. and Lewis Haffer, Esq., for Honorable Tom C. Clark, Attorney General.

Messrs. Milbank Tweed, Hope & Hadley, by Timothy N. Pfeiffer, Esq. and Mrs. Rebecca M. Cutler, for The Chase National Bank of the City of New York.

Walter S. Logan, Esq., by Lyon Boston, Esq., for Federal Reserve Bank of New York.

Joseph M. Cohen, Esq., for Leo Zittman.

Sidney Posner, Esq., for John J. McCloskey, Jr. as Sheriff of the City of New York.

Messrs. Katz & Sommerich, by Henry I. Fillman, Esq., for John F. McCarthy.

BONDY, District Judge:

In one of the above entitled actions the Attorney General, as successor to the Alien Property Custodian, moves for a decree declaring that he is entitled to the possession of the balance remaining to the credit of the Deutsche Reichsbank on the books of the respondent Federal Reserve Bank of New York and in the other he moves for a decree declaring that respondents Zittman, McCarthy and McCloskey, as sheriff, did not obtain any lien or other interest in the Reichsbank-Direktorium or Deutsche Golddiskontbank accounts on the books of the respondent Chase National Bank, and that the petitioner is entitled to the balances remaining in such accounts. Both proceedings involve similar facts and similar questions of law. The motion papers disclose that there is not any dispute as to any of the material facts.

[fol. 84] In December, 1941, Zittman brought an action in the Supreme Court of the State of New York, Kings County, as against the Deutsche Reichsbank and Deutsche Golddiskontbank, German nationals, to recover money allegedly due him, and in January, 1942, McCarthy brought an action in the same court against the Deutsche Reichs-

bank to recover money allegedly due him. At the time of the commencement of these actions, respondent McClosky as sheriff purported to levy on the balance due upon the accounts of the German banks in the respondent banks pursuant to attachments issued by the courts. The state courts ordered service of the summonses by publication, and judgments by default were entered in favor of Zittman on March 27, 1942 and in favor of McCarthy on April 24, 1942.

The accounts had been blocked under freezing controls of Executive Order No. 8389, 5 F. R. 1400, as extended to nationals of Germany by Executive Order No. 8785, 6 F. R. 2897, effective June 14, 1941, 12 U. S. C. A. Section 95a note. No license or other authorization for the payment of the judgments out of the blocked accounts was obtained and the respondent banks did not pay to the respondent sheriff any part of the balance due on the deposit accounts of the German banks.

On October 3, 1946, the Alien Property Custodian by an order vested in himself the indebtedness owing to the Reichsbank from the Chase Bank and on October 14, 1946, by an order vested in himself the indebtedness owing to the Golddiskontbank from the Chase Bank. Subsequent demands for payments of such indebtedness to the Custodian were refused by the Chase Bank unless the warrants of attachment issued in the actions brought by Zittman and McCarthy were released.

On October 3, 1946, the Custodian by an order vested in himself the indebtedness owing to the Reichsbank from the Federal Reserve Bank. On demand the Federal Reserve Bank remitted to the Custodian the amount thereof less a sum withheld to cover the attachments in the Zittman and McCarthy actions.

By stipulation the objections to the procedure adopted by the Attorney General in these actions were withdrawn, and it was agreed that the Treasury Department from the inception of the freezing controls informed all litigants who, prior to the commencement of attachment actions against funds belonging to blocked nationals, had requested the Secretary of the Treasury to license an attachment that: "Under Executive Order No. 8389 as amended, and the Regulations issued thereunder, no attempt is made

to limit the bringing of suits in the courts of the United States or of any of the States. However, should you secure a judgment against one of the parties referred to in your letter, which is a country covered by the Order, or a national thereof, a license would have to be secured before payment could be made from accounts in banking institutions within the United States in the name of such country or national." It was also stipulated that the Treasury adopted the position that the bringing of an action, the issuance of a warrant of attachment therein and the levy thereunder upon blocked property found within the jurisdiction of the court which issued the warrant, were not forbidden, but that a license was required before payment could be made from the blocked account to satisfy any judgment recovered in such action, and that the Treasury Department has at various times issued a license authorizing payment out of a blocked account of a blocked national for the purpose of making payment on a judgment recovered in an action where a prior warrant of attachment was issued and levied upon the blocked account of a blocked national, notwithstanding that a license to institute the action and levy the attachment was not procured by a plaintiff and judgment creditor, and further that a license to institute such action and levy the attachment [fol. 86] was in fact not required by the Treasury Department and that the Attorney General did not appear and did not take any steps in the actions brought by respondents McCarthy and Zittman in the Supreme Court of the State of New York in which the warrants were issued, of which actions he was given notice in writing.

The respondents contend that the allegedly attached accounts are in the custody of the state court, that the petitioner seeks relief which would unlawfully interfere with that custody, that full faith and credit must be given to the state attachment proceedings, that the vesting of the property in the Custodian would result in the taking of property without due process of law and that accordingly the petitions must be dismissed.

Arguments similar to those urged in opposition to these motions were presented and considered in *Clark v. Prop- per*, 169 F. (2) 324, affirming *Markham v. Taylor*, 70 F. Supp. 202. In that case the Circuit Court affirmed an

order of Judge Coxe granting a motion for summary judgment in an action seeking a declaration that a permanent receiver for an Austrian cooperative society had no title to or interest in amounts owed to said society by an American association, notwithstanding that the receiver had been appointed to receive and reduce to his possession all the assets of the society by a New York State court judgment which, were it not for the fact that the accounts were blocked, would have vested all title to the property in the receiver, and notwithstanding that a suit brought by the receiver against the association to recover the sums allegedly due was pending in a New York State court. It was held that even if the subject matter of the controversy were in the custody of the state court, the federal court had jurisdiction to adjudicate the claim of the Custodian, *Markham v. Allen*, 326 U. S. 490, that Executive Order No. 8389, as amended, prohibiting the unlicensed transfer of an enemy alien's property, applies to transfers by judicial [fol. 87] process, and that the Order was properly interpreted by Treasury Department General Ruling No. 12, April 21, 1942, 7 F. R. 2991, and by Treasury Department Public Circular No. 31, August 2, 1946, 11 F. R. 8351, both of which declare that judicial process cannot, without a license or other authorization from the Secretary, create any interest in blocked property. The court reached its conclusion even though it also was urged that the proceedings in the federal court constituted failure to accord full faith and credit to a judgment of the state court and that the vesting of the property in the Custodian would result in a taking of property without due process of law.

The court considers itself bound by that decision which expressly disagreed with the decision in *Singer v. Yokohama Specie Bank*, 293 N. Y. 542, upon which respondents rely. *Polish Relief Comm. v. Banca Nationala A. Rumaniei*, 288 N. Y. 332, also relied on by respondents, states that Executive Order No. 8389 "must be taken to have deprived the defendant of power to transfer any interest in these blocked accounts except through the medium of assignment subject to a releasing of the credit by the Secretary of the Treasury. The United States as *amicus curiae* supported the attachment involved in that case as inoffensive to national policy. The United States how-

ever in the instant cases denies that any rights were acquired by virtue of the attachments. The fact that the Treasury Department advised prospective litigants that no license was necessary to bring suit and secure the issuance of a warrant of attachment does not estop the petitioner from taking this position since it is consistent with General Ruling No. 12(4) which specifically provides that while a transfer of blocked property shall be valid and enforceable for the purpose of determining for the parties to an action the rights and liabilities litigated, no attachment, judgment, or other judicial process shall confer any [fol. 88] greater interest in any blocked property than the owner of such property could create by voluntary act prior to the issuance of a license.

Because the attachments by the sheriff did not transfer any right, title or interest in the block property, his application for payment of his fees by the Custodian must be denied.

The Chase National Bank claims the right to set off against the Custodian's claims a contingent liability on a guaranty made by it for the account of the Reichsbank to the Irving Trust Company against loss arising from the payment by said trust company of a draft without presentation of the original and duplicate. The guaranty of the Chase Bank to Irving Trust Company does not create any banker's lien or set-off to the claim of the Custodian to the assets of the Reichsbank. See *Clark v. Manufacturers Trust Company*, decided by the Court of Appeals for the Second Circuit, August 5, 1948.

The Chase Bank also claims custodian fees accruing in connection with the Golddiskontbank's custody account. The Attorney General having consented to the deduction of the fees without conceding that they are deductible as a matter of right, it becomes unnecessary for the court to pass upon the claim for the allowance.

The motions accordingly are granted subject to the allowance of custodian fees pursuant to the consent of the petitioner.

October 1, 1948.

/s/ Wm. Bondy, United States District Judge.

[fol. 89] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

Civ. 44-618

TOM C. CLARK, Attorney General, as successor to the Alien
Property Custodian, Petitioner, —

FEDERAL RESERVE BANK OF NEW YORK, and JOHN J. MC-
CLOSKEY, JR., as Sheriff of the City of New York, and
LEO ZITTMAN and JOHN F. MCCARTHY, Respondents

FINAL DECREE APPEALED FROM—January 13, 1949

This cause having come on for hearing on March 5 and March 17, 1948, before the Honorable William Bondy, District Judge, on order to show cause issued pursuant to the petition of Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, and the court having examined the pleadings, stipulations of fact, and other papers on file and having heard argument of counsel and being otherwise fully advised and satisfied in the premises and having rendered an opinion in writing dated October 1, 1948, now therefore, it is Ordered, Adjudged, Decreed and Declared:

I. That by virtue of Vesting Order No. 7794 and Turn-over Directive of October 14, 1946, the petitioner Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, became entitled to possession of those certain debts or obligations owing to Deutsche Reichsbank, also known as Reichsbank, and as Reichsbank-Direktorium, by Federal Reserve Bank of New York, New York, arising out of bank accounts entitled, Reichs-[fol. 90] bank, Reichsbank Special Account, Reichsbank-Direktorium, Standstill Account 1938 No. 2, and Reichsbank-Direktorium, Standstill Account 1938 No. 3, in the total amount of \$1,003,382.78 and respondent Federal Reserve Bank of New York having previously delivered to the petitioner the sum of \$703,382.78 on account of said debts or obligations, the petitioner remains and is now entitled to the possession of the entire balance of said debts or ob-

ligations in the sum of \$300,000, together with all accrued dividends and accumulations, if any, as against the respondents, Federal Reserve Bank of New York, John J. McCloskey, Jr., as sheriff of the City of New York, Leo Zittman and John F. McCarthy.

II. That the application of John J. McCloskey, Jr., as sheriff of the City of New York, for payment of his fees be, and the same hereby is, denied.

III. That no costs be allowed to any party herein.

Dated: New York, New York, January 13th, 1949.

Wm. Bondy, U. S. D. J.

Judgment entered, William V. Connell, Clerk.

Jan 20 1949

[fol. 91] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

NOTICE OF APPEAL BY JOHN F. MCCARTHY—March 2, 1949

Sirs:

Notice Is Hereby Given that John F. McCarthy, one of the respondents above named, hereby appeals to the United States Court of Appeals for the Second Circuit, from the final decree dated January 13, 1949, and entered herein on January 20, 1949.

Dated, New York, N. Y., March 2, 1949.

Yours, etc., Katz & Sommerich, Attorneys for Respondent, John F. McCarthy, Office & P. O. Address: 120 Broadway, New York 5, N. Y.

[fol. 92] To:

John F. X. McGohey, Esq., United States Attorney, Attorney for Petitioner, United States Courthouse, Foley Square, New York, N. Y.

Walter S. Logan, Esq., Attorney for Respondent, Federal Reserve Bank of New York, 33 Liberty Street, New York 7, N. Y.

Sidney Posner, Esq., Attorney for the Respondent, John J. McCloskey, Jr., as Sheriff of the City of New York, Hall of Records, 31 Chambers Street, New York 7, N. Y.

Joseph M. Cohen, Esq., Attorney for Respondent, Leo Zittman, 36 West 44th Street, New York 18, N. Y.

Clerk of the United States District Court, Southern District of New York, United States Courthouse, Foley Square, New York, N. Y.

[fol. 93] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

NOTICE OF APPEAL BY LEO ZITTMAN—March 7, 1949

Sirs:

Notice Is Hereby Given that Leo Zittman, one of the respondents above named, hereby appeals to the United States Court of Appeals for the Second Circuit, from the final decree dated January 13, 1949, and entered herein on January 20, 1949.

Dated, New York, N. Y., March 7, 1949.

Yours, etc., Joseph M. Cohen, Attorney for Respondent, Leo Zittman, Office & P. O. Address: 36 West 44th Street, New York 18, N. Y.

[fol. 94] To:

John F. X. McGohey, Esq., United States Attorney, Attorney for Petitioner, United States Courthouse, Foley Square, New York, N. Y.

Walter S. Logan, Esq., Attorney for Respondent, Federal Reserve Bank of New York, 33 Liberty Street, New York 7, N. Y.

Sidney Posner, Esq., Attorney for the Respondent, John J. McCloskey, Jr., as Sheriff of the City of New York, Hall of Records, 31 Chambers Street, New York 7, N. Y.

Katz & Sommerich, Esqs., Attorneys for Respondent, John F. McCarthy, 120 Broadway, New York 5, N. Y.

Clerk of the United States District Court, Southern District of New York, United States Courthouse, Foley Square, New York, N. Y.

[fol. 95] UNITED STATES DISTRICT COURT. SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

NOTICE OF APPEAL BY JOHN J. McCLOSKEY—March 11, 1949

Sirs:

Notice Is Hereby Given that John J. McCloskey, as Sheriff of the City of New York, one of the respondents above named, hereby appeals to the United States Court of Appeals for the Second Circuit, from the final decree dated January 13, 1949, and entered herein on January 20, 1949.

Dated, New York, N. Y., March 11, 1949.

Yours, etc., Sidney Posner, Attorney for Respondent, John J. McCloskey, as Sheriff of the City of New York, Office & P. O. Address: Hall of Records, 31 Chambers Street, New York 7, N. Y.

[fol. 96] To:

John F. X. McGohey, Esq., United States Attorney, Attorney for Petitioner, United States Courthouse, Foley Square, New York, N. Y.

Walter S. Logan, Esq., Attorney for Respondent, Federal Reserve Bank of New York, 33 Liberty Street, New York 7, N. Y.

Joseph M. Cohen, Esq., Attorney for Respondent, Leo Zittman, 36 West 44th Street, New York 18, N. Y.

Katz & Sommerich, Esqs., Attorneys for Respondent, John F. McCartay, 120 Broadway, New York 5, N. Y.

Clerk of the United States District Court, Southern District of New York, United States Courthouse, Foley Square, New York, N. Y.

[fol. 97] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

STIPULATION AS TO RECORD

It Is Hereby Stipulated and Agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties to the appeals herein, the Federal Reserve Bank of New York not having appealed from the decree dated January 13, 1949 and the time within which to appeal having expired.

Dated, New York, N. Y., October 28, 1949.

John F. X. McGohey, Attorney for Petitioner-Appellee, Sidney Posner, Attorney for Respondent-Appellant, John J. McCloskey, Jr., Joseph M. Cohen, Attorney for Respondent-Appellant, Leo Zittman, Katz & Sommerich, Attorneys for Respondent-Appellant, John F. McCarthy.

[fol. 98] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 99] UNITED STATES COURT OF APPEALS FOR THE SECOND
CIRCUIT

Nos. 207-208—October Term, 1949

(Argued May 9, 1950. Decided June 2, 1950)

Docket Nos. 21620 and 21621

J. HOWARD McGRATH, Attorney General, as successor to the
Alien Property Custodian, Petitioner-Appellee,

v.

CHASE NATIONAL BANK OF THE CITY OF NEW YORK, and
JOHN J. McCLOSKEY, JR., as Sheriff of the City of New
York, and LEO ZITTMAN and JOHN F. MCCARTHY, Re-
spondents-Appellants,

J. HOWARD McGRATH, Attorney General, as successor to the
Alien Property Custodian, Petitioner-Appellee,

v.

FEDERAL RESERVE BANK OF NEW YORK, and JOHN J. McCLOS-
KEY, JR., as Sheriff of the City of New York, and LEO
ZITTMAN and JOHN F. MCCARTHY, Respondents-Appel-
lants

PER CURIAM OPINION—June 2, 1950

Before: SWAN, Augustus N. Hand and Chase, Circuit
Judges.

Appeals from the United States District Court for the
Southern District of New York

Joseph M. Cohen, Attorney for Appellant Zittman.
Katz & Sommerich, Attorneys for Appellant McCar-
thy; Henry I. Fillman and Otto C. Sommerich, of
counsel.

Sidney Posner, Attorney for Appellant McCloskey.
Harold I. Baynton, Acting Director, Office of Alien
Property; Irving H. Saypol, United States Attor-
ney, James L. Morrisson and Ralph S. Spritzer,
Attorneys, Department of Justice, Washington,
D. C.; for Appellee.

[fol. 100] Per CURIAM:

Decrees of the District Court, 82 F. Supp. 740, affirmed as to appellants Zittman and McCarthy on the authority of *Propper v. Clark*, 337 U. S. 472, and as to appellant Sheriff of the City of New York on the ground stated in the opinion below.

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

Present: Hon. Thomas W. Swan, Hon. Augustus N. Hand,
Hon. Harrie B. Chase, Circuit Judges.

J. HOWARD McGRATH, Attorney General, etc., Petitioner-
Appellee,

v.

CHASE NATIONAL BANK OF N. Y. & JOHN J. McCLOSKEY, JR.,
as Sheriff, et al., Respondents-Appellees

JUDGMENT—June 2, 1950

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

/s/ Alexander M. Bell, Clerk.

[Endorsed:] United States Court of Appeals, Second Circuit. J. Howard McGrath, Attorney General v. Chase National Bank of N. Y. & J. J. McCloskey, as Sheriff, et al. Judgment. United States Court of Appeals, Second Circuit. Filed June 2, 1950. Alexander M. Bell, Clerk.

[fols. 101-107] UNITED STATES COURT OF APPEALS, SECOND
CIRCUIT

Present: Hon. Thomas W. Swan, Hon. Augustus N. Hand,
Hon. Harrie B. Chase, Circuit Judges.

J. HOWARD McGRATH, Attorney General, etc., Petitioner-
Appellee,

v.

FEDERAL RESERVE BANK OF NEW YORK, & JOHN J. McCLOS-
KEY, JR., as Sheriff, et al., Respondents-Appellants

JUDGMENT—June 2, 1950

Appeal from the District Court of the United States for
the Southern District of New York.

This cause came on to be heard on the transcript of rec-
ord from the District Court of the United States for the
Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, ad-
judged, and decreed that the decree of said District Court
be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said
District Court in accordance with this decree.

/s/ Alexander M. Bell, Clerk.

[Endorsed:] United States Court of Appeals, Second
Circuit. J. Howard McGrath, Attorney General, etc., v.
Federal Reserve Bank of N. Y. & J. J. McCloskey, as
Sheriff, et al. Judgment. United States Court of Appeals,
Second Circuit. Filed June 2, 1950. Alexander M. Bell,
Clerk.

[fols. 108-117] PETITION OF APPELLANT MCCARTHY FOR
REHEARING—Filed June 16, 1950, omitted in printing

[fols. 118-120] APPELLANT SHERIFF'S PETITION FOR REHEAR-
ING—Filed June 16, 1950, omitted in printing

[fol. 121] UNITED STATES COURT OF APPEALS FOR THE SECOND
CIRCUIT

J. HOWARD McGRATH, Attorney General, as Successor to the
Alien Property Custodian, Petitioner-Appellee,

v.

CHASE NATIONAL BANK OF THE CITY OF NEW YORK, and JOHN
J. McCLOSKEY, JR., as Sheriff of the City of New York,
and LEO ZITTMAN and JOHN F. MCCARTHY, Respondents-
Appellants

J. HOWARD McGRATH, Attorney General, as successor to the
Alien Property Custodian, Petitioner-Appellee,

v.

FEDERAL RESERVE BANK OF NEW YORK, and JOHN J. McCLOS-
KEY, JR., as Sheriff of New York City, and LEO ZITTMAN &
JOHN F. MCCARTHY, Respondents-Appellants

Before: Swan, Augustus N. Hand and Chase, Circuit
Judges.

ORDER DENYING PETITIONS FOR REHEARING—June 27, 1950
Joseph M. Cohen, Attorney for Appellant Zittman.

Katz & Sommerich, Attorneys for Appellant McCarthy.
Sidney Posner, Attorney for appellant McCloskey.

Per CURIAM:

Petitions for rehearing denied.

T.W.S., A.N.H., H.B.C., C. J.J.

[Endorsed:] United States Court of Appeals, Second
Circuit. Filed June 27, 1950. Alexander M. Bell, Clerk.

[fol. 122] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

Present: Hon. Thomas W. Swan, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

J. HOWARD McGRATH, etc., Petitioner-Appellee,

v.

CHASE NATIONAL BANK OF THE CITY OF NEW YORK, JOHN J. McCLOSKEY, JR., as Sheriff, et al., Respondents-Appellants

J. HOWARD McGRATH, etc., Petitioner-Appellee,

v.

FEDERAL RESERVE BANK OF NEW YORK, et al., Respondents-Appellants

ORDER DENYING PETITIONS FOR REHEARING—June 27, 1950

Petitions for a rehearing having been filed herein by counsel for the appellants Zittman, McCarthy & McCloskey,

Upon consideration thereof, it is

Ordered that said petitions be and hereby are denied.

(s.) Alexander M. Bell, Clerk.

[Endorsed:] United States Court of Appeals, Second Circuit. J. Howard McGrath, etc., v. Chase National Bank of the City of N. Y., et al. J. Howard McGrath, etc., v. Federal Reserve Bank of New York, et al. Order. United States Court of Appeals, Second Circuit. Filed June 27, 1950. Alexander M. Bell, Clerk.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 123] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1950

No. 298

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed November 13, 1950

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 124] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1950

No. 299

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed November 13, 1950

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 125] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1950

No. 314

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed November 13, 1950

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 126] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1950

No. 315

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed November 13, 1950

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 127] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1950

No. 324

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed November 13, 1950

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1591)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 298,291,314,315 & 324

LEO ZITTMAN (with whom The Chase National Bank of the
City of New York was impleaded below),

Petitioner,

against

J. HOWARD McGRATH, Attorney General, as Successor to
the Alien Property Custodian,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT AND ANNEXED
BRIEF IN SUPPORT THEREOF**

JOSEPH M. COHEN,
Attorney for Petitioner,
36 West 44th Street,
New York 18, N. Y.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1950

LEO ZITTMAN (with whom The Chase National Bank of the
City of New York was impleaded below),
Petitioner,
against

J. HOWARD MCGRATH, Attorney General, as Successor to
the Alien Property Custodian,¹
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT AND ANNEXED
BRIEF IN SUPPORT THEREOF**

*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Your petitioner, Leo Zittman, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review the judgment of that court, dated June 2, 1950, made in the above cause.

This petition is a companion to the petition filed concurrently herewith, entitled "Leo Zittman (with whom the Federal Reserve Bank of New York was impleaded below),

¹ J. Howard McGrath was substituted in the Court of Appeals for Tom C. Clark, as Attorney General.

petitioner, against J. Howard McGrath, Attorney General, as Successor to the Alien Property Custodian, respondent".² For purposes of convenience, the latter will be referred to as the "Federal Reserve case".

Opinions Below

The opinion of the District Court for the Southern District of New York is reported at 82 F. Supp. 740. The opinion of the Court of Appeals for the Second Circuit is *per curiam* and is reported at 182 F. 2d 349 (IIR p. 99).³

Jurisdiction

The judgment below was rendered June 2, 1950 (IIR p. 100). Petition for rehearing was filed June 15, 1950, and denied on June 27, 1950 (IIR p. 121). Jurisdiction of this Court is invoked under Title 28 of the United States Code, § 1254. The original record and requisite copies are on file in this Court.

² The instant case and the Federal Reserve case were brought to test the validity of a New York State court attachment levied, in a single action brought by petitioner, upon certain bank accounts maintained by two German banks with the Chase National Bank of the City of New York and the Federal Reserve Bank of New York. Though there was but one action in the state court, respondent filed two separate proceedings in the District Court. One related to the attached accounts maintained with the Chase Bank. The other related to the attached accounts maintained with the Federal Reserve Bank. Each bank was a party to only that proceeding in the District Court which involved the particular accounts maintained with it. Though the two cases were heard on separate records and briefs and resulted in separate judgments below, they were dealt with by a single opinion both in the District Court and in the Court of Appeals. Neither bank appealed from the judgments of the District Court.

³ The record in the instant case and in the Federal Reserve case have been bound together and designated Parts I and II, respectively. Record references are as follows: "IR" refers to the record of the instant case; "IIR" refers to the record of the Federal Reserve case. Except where indicated otherwise, references are to folios.

Statutes Involved

1. The Congressional Joint Resolution of May 7, 1940, amending § 5(b) of the Trading with the Enemy Act and the relevant portions of Executive Order 8389, as amended, issued pursuant thereto. Appendix, pp. 23-24.

2. The New York Civil Practice Act, the relevant portions of which appear in Appendix, *infra*, pp. 26-30.

3. The New York Judiciary Law, the relevant portions of which appear in Appendix, *infra*, p. 26.

Nature of the Proceeding

This is a test case brought by respondent, as successor to the Alien Property Custodian, to establish a precedent for the disposition of a large number of similar cases still pending.^{3a}

This case presents for determination the rights acquired by an American citizen by reason of a pre-war suit brought by him in a New York State court against two German banks.^{3b} Petitioner, unable to obtain personal service of process upon the non-resident German banks (IR 202), sued them in the state court by attaching certain bank accounts maintained by the German banks with the Chase National Bank of New York City (hereinafter called "Chase Bank"). These bank accounts were then blocked under the freezing controls of Executive Order 8389 (5 F. R. 1400). Petitioner attached on December 11, 1941 and took judgment on March 27, 1942.

^{3a} Respondent's counsel so stated in the District Court. In New York County alone there are still pending some 49 such cases involving more than \$16,548,328.26. Appendix, p. 32.

^{3b} The Reichsbank and the Deutsche Golddiskontbank, hereinafter referred to as the "German banks."

In October, 1946, almost five years after the attachment, respondent ⁴ vested the right, title and interest of the German banks in the attached bank accounts. Some sixteen months later, respondent asserting, in effect, that the attachment was void as against the German banks—whose rights he was seeking to enforce—because the funds levied upon had been blocked by the freezing controls of Executive Order 8389, petitioned the District Court for the Southern District of New York for a declaratory judgment decreeing, in effect, that, because of the freezing controls, petitioner's attachment was void and that the German banks—and respondent as their successor—were entitled to the attached funds.

The District Court granted the relief sought by petitioner and the Court of Appeals for the Second Circuit has affirmed.

Questions Presented

1. Whether an attachment of blocked funds for jurisdictional purposes, in aid of an action brought by an American citizen against a non-resident blocked national, is void notwithstanding respondent's concession in this case (IR 263-265) that, under Presidential Executive Order 8389, "the bringing of an action, the issuance of a warrant of attachment therein, and the levy thereunder upon blocked property found within the jurisdiction of the court which issued the warrant were not forbidden" by the freezing controls "but that a license was required to be secured before payment could be made from the blocked account to satisfy any judgment recovered in such action".

2. Whether petitioner's attachment of frozen funds on December 11, 1941, was an event which gave rise to valid

⁴ The terms "respondent" and "Custodian" are used interchangeably to refer either to the Alien Property Custodian or to the Attorney General who succeeded to the Custodian's power and duties. Executive Order No. 9788, 1 C. F. R. 1946 Supp. 169.

rights and liabilities within the purview of *Lyon v. Singer* and *Lyon v. Banque Mellie Iran*, 339 U. S. 841, decided June 5, 1950, or whether petitioner's attachment was a nullity. In other words, is the instant case controlled by *Lyon v. Singer* and *Lyon v. Banque Mellie Iran*, *supra*, or by *Propper v. Clark*, 337 U. S. 472? This question is presented squarely here by the following *per curiam* opinion below:

"Per Curiam:

Decree of the District Court, 82 F. Supp. 740, affirmed as to the appellants Zittman and McCarthy on the authority of *Propper v. Clark*, 337 U. S. 472, and as to the appellant Sheriff of the City of New York on the ground stated in the opinion below."

3. Whether the holding below, by nullifying the rights vested in petitioner by his attachment and the ensuing judgment, deprives petitioner of his property in contravention of the Fifth Amendment to the Federal Constitution.

4. Whether the District Court should have declined to entertain this cause because—

a) this proceeding was an unwarranted collateral attack on petitioner's state court judgment, in violation of the full faith and credit clause of the Federal Constitution;

b) this proceeding precipitated a conflict of jurisdiction over a *res* in violation of the settled rule of comity between state and federal courts; and

c) a full and adequate remedy was available to respondent in the state court.

Specification of Errors

The court below erred—

1. In holding that petitioner's attachment and judgment were nullities and in refusing to hold that the same are valid.
2. In holding that this case was controlled by *Propper v. Clark*, 337 U. S. 472, instead of *Lyon v. Singer* and *Lyon v. Banque Mellic Iran*, 339 U. S. 841.
3. In refusing to hold that the District Court should have refused to entertain this cause.
4. In affirming the judgment of the District Court and refusing to reverse such judgment and direct dismissal of respondent's petition.

Summary Statement of the Matter Involved

The facts are undisputed (IR 292). They comprise (a) the circumstances attending the advent of the freezing controls of Executive Order No. 8389 and the extent to which the controls were applied to attachment actions generally and (b) the particular facts of petitioner's state court attachment and of respondent's attempt to vest the attached property.

A.

It is conceded that the attachment of blocked funds was authorized under the freezing controls.

Executive Order 8389 (5. F. R. 1400) created the freezing controls. It was issued on April 8, 1940, under the authority of Sec. 5(b) of the Trading with the Enemy Act. Its purpose was to protect against German conquest securities and credits, located here, belonging to Norway and Denmark and their nationals. By Congressional Joint Resolution, enacted on May 7, 1940 (54 Stat. 179), this

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use of the power given to the President was confirmed and clarified.⁵

As Axis conquest progressed, the President extended the scope of the Executive Order until, on June 14, 1941, it applied to nationals of most of continental Europe, including Germany (Exec. Order 8785, 6 F. R. 2897).

At all of the times material here, the Secretary of the Treasury administered the freezing controls under a delegation of power by the President (Exec. Order 8389, Sec. 7). The controls were under Treasury administration when petitioner attached the bank accounts here in question.

Executive Order 8389, Sec. 1, prohibited specified transactions in blocked property unless "authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses or otherwise". Although the Executive Order did not include litigation among the categories of controlled transactions, nonetheless the Secretary of the Treasury was besieged by applications from prospective litigants for licenses to attach blocked funds.⁶ In response to these many requests, the Secretary ruled, from the very inception of freezing controls, that no license was needed because the attachment of blocked funds was not forbidden by the controls but that, if the plaintiff recovered a judgment, a license would be required before the blocked funds could be paid to satisfy the judgment. The parties have so stipulated here. Following are portions of the formal stipulation of fact in this case (IR 263-266):

⁵ After the United States entered the war, the President's power over alien-owned property was expanded by the First War Powers Act, passed December 18, 1941 (55 Stat. 839), which further amended Sec. 5(b) of the Trading with the Enemy Act. Because the First War Powers Act came after petitioner's attachment, neither this Act nor the regulations or rulings issued thereunder—as, for example, General Ruling No. 12—are relevant here. *Propper v. Clark*, 337 U. S. 472, 485; Brief, *infra*, pp. 45-46.

⁶ Such applications ran "into the hundreds". Brief (p. 39) of the Treasury Department as *amicus curiae* in *Commission for Polish Relief v. Banca Nationala a Rumaniei*, 288 N. Y. 332.

"5. From the inception of 'freezing' controls, all litigants who, prior to commencing attachment actions against funds belonging to blocked nationals, had requested the Secretary of the Treasury to license an attachment, or levy, received from the Treasury Department a response of the following nature:

Under Executive Order No. 8389, as amended, and the Regulations issued thereunder, no attempt is made to limit the bringing of suits in the courts of the United States or of any of the States. However, should you secure a judgment against one of the parties referred to in your letter, which is a country covered by the order, or a national thereof, a license would have to be secured before payment could be made from accounts in banking institutions within the United States in the name of such country or national.

"6. From the inception of 'freezing' controls, the Secretary of the Treasury in administering the 'freezing' control program adopted the position, in response to numerous requests made of him, that the bringing of an action, the issuance of a warrant of attachment therein, and the levy thereunder upon blocked property found within the jurisdiction of the court which issued the warrant were not forbidden but that a license was required to be secured before payment could be made from the blocked account to satisfy any judgment recovered in such action.

"7. The Treasury Department has at various times issued licenses authorizing payment out of a blocked account of a blocked national for the purpose of making payment on a judgment recovered in an action where a prior warrant of attachment was issued and levied upon the blocked account of a blocked national therein notwithstanding that a particular license to institute the action and levy the attachment was not procured by a plaintiff and judgment-creditor. **A license to institute the action and levy the attachment was in fact not required by the Treasury Department.**" (Emphasis supplied.)

B.

c. Petitioner's state court attachment.

On December 11, 1941, before war was declared against Germany, petitioner Zittman, a resident citizen of the United States, sued in the Supreme Court of the State of New York for Kings County on a claim against the two German banks (IR 197-198).

Both German banks were foreign corporations with offices in Germany; neither was amenable to personal service (IR 202). Petitioner, being unable to sue *in personam*, proceeded by attachment. On December 11, 1941, a warrant of attachment issued out of the Supreme Court for Kings County, New York, to the Sheriff. The Sheriff levied upon the blocked accounts maintained by the two German banks with the Chase Bank by serving a certified copy of the warrant on the Chase Bank on December 11, 1941, at 2:41 P. M., E. S. T. (IR 198-199, 269).⁷ Service of the warrant effected a seizure of all of the rights of the German banks in the attached accounts (N. Y. Civil Practice Act, Sec. 916[3]).

In response to the warrant, the Chase Bank certified to the Sheriff those credits, totaling \$57,005.33, and securities which it held for the German banks and reported that the same were held by it "subject to Executive Order No. 8389, as amended" (IR 234-235). The attached property continues—to this day—to be held subject to the Federal freezing controls (IR 20).

⁷ Petitioner attached on December 11, 1941, at 2:41 P. M., E. S. T.—before war with Germany began on December 11, 1941, at 3:05 P. M., E. S. T. (55 Stat. 796). On the same day, at 2:20 P. M., E. S. T., the Sheriff had made like service on the Federal Reserve Bank of New York (IR 192-3, 230, 97-101). The Federal Reserve levy attached certain accounts of the Reichsbank only. Apparently, the Federal Reserve held no credits or property for the Golddiskontbank. The attachment in the case of the Federal Reserve was made the subject of a separate petition below. The judgment on this latter petition is the subject of a separate petition to this Court for a writ of certiorari, filed simultaneously herewith.

The provisional jurisdiction acquired by the state court attachment was perfected. As required by state law, summons was regularly served on the two German banks by publication and copies of the summons, complaint and other requisite documents were regularly mailed to the Attorney General of the United States on behalf of the two German banks (IR 201-202). Respondent acknowledged receipt of the mailing (IR 203, 260).

Neither of the German banks nor the U. S. Attorney General appeared in the state court action or took any steps therein. On March 27, 1942, petitioner took judgment in the state court action against the German banks for a total of \$146,724.40 and costs (IR 204).

Respondent concedes that the state court attachment proceeding was regularly begun and reduced to judgment.

No execution has issued to enforce petitioner's judgment out of the attached blocked property (IR 20). It is agreed by all parties that execution cannot issue until a federal license is granted, under the freezing controls, authorizing application of the blocked funds to payment of the judgment. Pending application for, and issuance of, such a license, petitioner has, from time to time, applied for and secured orders of the state court extending the time within which the Sheriff might sue to reduce the attached funds and property to his possession. These orders have been duly and regularly served on the Chase Bank (IR 208, 108-110). By reason of the service of these orders, the funds and securities continue under attachment (N. Y. *Civ. Prac. Act*, Sec. 922). The attachment has never been vacated, released, discharged or otherwise annulled (IR 209, 111).

Almost five years after petitioner attached, the Alien Property Custodian executed two limited vesting orders affecting the attached accounts.

One, Vesting Order No. 7792, was executed October 3, 1946, and purported to vest the right, title and interest of the Reichsbank in its account with the Chase Bank (IR 37-44). The other, Vesting Order No. 7870, was exe-

cutted October 14, 1946, and purported to vest the right, title and interest of the Golddiskontbank in its accounts with the Chase Bank (IR 55-60).⁸

These vesting orders necessitated a determination of the *quantum* of interest remaining in the German banks after the attachment, for it is conceded that only this residual interest was vested by respondent.⁹ To secure this determination, respondent instituted the present summary proceeding against petitioner, joining the Chase Bank and the Sheriff.

As already noted, the District Court, upon the authority of *Clark v. Propper*, 169 F. 2d 324, held that the attachment was void as to the German banks and that they were entitled to the whole of the attached accounts. It awarded a declaratory judgment to respondent, who claimed only the interest of the German banks under his limited vesting orders (IR 307-316). The Court of Appeals affirmed solely on the authority of *Propper v. Clark*, 337 U. S. 472.

REASONS FOR GRANTING THE WRIT

I.

The Holding Below Conflicts with *Commission for Polish Relief v. Banca Nationala a Rumaniei*, 288 N. Y. 332, and Other Authorities.

The Second Circuit holds in the instant case that an attachment of frozen funds of a blocked national—though concededly authorized by the Secretary of the Treasury—is void by reason of the freezing controls.

The New York State Court of Appeals held precisely to the contrary in *Commission for Polish Relief v. Banca*

⁸ The District Court adjudged the orders to be "right, title and interest" vesting orders (IR 312-313).

⁹ The limited force of a "right, title and interest" vesting order is discussed hereafter. Brief, *infra*, pp. 33-36.

Nationala a Rumaniei, 288 N. Y. 332, in which the United States Treasury Department appeared as *amicus curiae* and supported the validity of the attachment.^{9a} In the *Polish Relief* case the New York State Court of Appeals upheld the right to attach blocked funds, saying at page 338:

"The Executive Order [8389] did not forbid attachment of the conceded interest of the defendant in the credits upon which the levies were made. For all we know, payment of the blocked accounts to the credit of this action can be permitted consistently with the purpose of the Order. We are not to presuppose that this will inevitably be refused in the event of a judgment for the plaintiff (Cf. *Simpson v. Jersey City Contracting Co.*, 165 N. Y. 193, 200). The lien of an attachment is always hypothetical in some degree. A 'seizure subject to license' was, we think, sufficient for the purpose of jurisdiction *in rem* over the deposits in question."

Other cases, both state and federal, have held to the same effect.

Feuchtwanger v. Central Hanover Bank & T. Co., 288 N. Y. 342 (decided the same day as the *Polish Relief* case).

Singer v. Yokohama Specie Bank, 293 N. Y. 542, 299 N. Y. 113, 299 N. Y. 791, aff'd 339 U. S. 841.

Sun Insurance Office, Limited v. Arauca Fund, 84 F. Supp. 516.

Metallo-Chemical Corp. v. Banque Transatlantique S.A., 188 N. Y. Misc. 596.

So far as we can determine, only the instant case has held otherwise.

The conflict between the instant case and the *Polish Relief* case is accentuated here because the two courts reached opposite conclusions upon the same facts. In both

^{9a} The Treasury supported the validity of the attachment even though it had refused specifically to license the attachment.

courts the United States conceded, in almost identical language, that the Secretary of the Treasury, in administering the freezing controls, authorized the attachment of frozen funds.¹⁰

The New York State Court of Appeals, in the *Polish Relief* case, construed the Treasury's ruling to mean that blocked funds may be attached to found jurisdiction and the action reduced to judgment, subject to a license under the federal controls as a condition precedent to payment of the attached blocked funds in satisfaction of the judgment. The courts of the State of New York have consistently adhered to this view of the controls in dealing with litigation involving property of blocked nationals. The litigation has been permitted to proceed, but pay-

¹⁰ Compare the stipulation of fact in the instant case (IR 263-266) with the following quoted from the brief of the United States as *amicus curiae* (p. 39) in the *Polish Relief* case:

"From the very inception of freezing control, litigants, prior to commencing attachment actions against funds belonging to blocked nationals, have requested the Secretary of the Treasury to license a transfer to the sheriff by attachment. In all those cases running into the hundreds, the Treasury Department has taken a consistent position. The Treasury Department has authorized the bringing of an attachment action. However, the Treasury Department has not licensed a transfer of the blocked funds to the sheriff prior to judgment.

"In response to requests that a license be issued to transfer the attached funds prior to judgment, the Treasury Department has, in practice, made a statement of the following nature:

Under Executive Order No. 8389, as amended, and the Regulations issued thereunder, no attempt is made to limit the bringing of suits in the courts of the United States or of any of the States. However, should you secure a judgment against one of the parties referred to in your letter, which is a country covered by the Order, or a national thereof, a license would have to be secured before payment could be made from accounts in banking institutions within the United States in the name of such country or national.

"From the terms of the statement, it may be clearly seen that the Secretary of the Treasury authorized the bringing of an attachment action. * * * (Emphasis supplied.)

ment of the judgment has been made to await the sanction of a federal license under the freezing controls.¹¹ Within the last few months, this Court has approved this construction of the freezing controls. *Lyon v. Singer* and *Lyon v. Banque Mellie Irun*, 339 U. S. 841, decided June 5, 1950.

The Second Circuit, however, adheres to a contrary view. In its view, transactions in frozen funds are wholly void. No proceedings may be maintained to create or enforce rights arising out of such transactions—irrespective of the admitted Treasury authority sanctioning such proceedings—unless specifically licensed. In addition to the instant case, the Second Circuit has so held in *Clark v. Propper*, 169 F. 2d 324, and *Bernstein v. N. V. Nederlandsche-Amerikaansche*, etc., 173 F. 2d 71.

The essential difference between the position of the two courts is that the New York State Court of Appeals—in accordance with the Treasury's ruling—requires that a license be procured after judgment as a condition precedent to satisfaction of the judgment. The Second Circuit—contrary to the Treasury's ruling—requires a license before the court may even adjudicate.

The conflict between the two courts creates the anomaly of judgments, resting upon attachment, which are valid in the state courts of New York but void when brought into question in the federal courts of New York. Thus, petitioner's state court judgment is valid under the *Polish*

¹¹ *Singer v. Yokohama Specie Bank*, 293 N. Y. 542, 299 N. Y. 113, in which the U. S. appeared as *amicus*, aff'd 339 U. S. 841; *Leeds v. Guaranty Trust Co.*, 65 N. Y. S. 2d 431, aff'd 272 N. Y. App. Div. 909, aff'd 297 N. Y. 1019, in which the U. S. appeared as *amicus*; *Feuchtwanger v. Central Hanover Bank & Trust Co.*, 288 N. Y. 342; *Metallo-Chemical Corp. v. Banque Transatlantique S. A.*, 188 N. Y. Misc. 596; *Bollaek v. Societe General*, etc., 263 N. Y. App. Div. 601; *R. & L. Goldmuntz, Sprl. v. Fisher*, 54 N. Y. S. 2d 635; *Drewry v. Onassis*, 188 N. Y. Misc. 912, 914, aff'd 272 N. Y. App. Div. 870; *Cable & Wireless, Ltd. v. Yokohama Specie Bank*, 191 N. Y. Misc. 567; *Suomen Pankki v. Bell*, 80 N. Y. S. 2d 821, 829.

Relief case and under this court's holding in *Lyon v. Singer* and *Lyon v. Banque Mellie Iran*, 339 U. S. 841. It is void under the holding below.

Also, the conflict between the two courts places an attachment debtor in the impossible position of being adjudged by the federal court to owe the attached funds to the blocked national and, at the same time, of being in contempt of the state court if he pays to the blocked national or to respondent as his successor. N. Y. Civ. Prac. Act, Sec. 917(2); N. Y. Judiciary Law, Secs. 750(3), 753(3), 753(8).

Moreover, the holding below establishes a startling and novel doctrine. The rights of the enemy German banks—asserted here by respondent—are permitted to prevail over the pre-war attachment of petitioner, an American citizen. As construed below, the freezing controls cloak the German banks with immunity from attachment of their property by American citizens. So construed, the controls are distorted from a check upon the enemy to a check upon American citizens.

Certiorari is necessary to eliminate these incongruous results. It is needed for another important reason. The holding below cannot be made effective without a further proceeding in the state court in whose custody and control the attached property now rests. Respondent admits that he must now ask the state court to enforce the judgment below by acknowledging the invalidity of its custody, vacating its attachment and injunction and surrendering the attached property to him. Since the judgment below attempts to adjudicate the state court's title to property in the latter's custody and control, the state court may refuse to recognize the judgment below. *Ex parte Baldwin*, 291 U. S. 610, 615-615; *Lion Bonding & S/Co. v. Karatz*, 262 U. S. 77, 89; *Peck v. Jenness*, 7 How. (U. S.) 612, 624-626; *Leadville Coal Co. v. McCreery*, 141 U. S. 475-477; *Nogue v. Clapp*, 101 U. S. 551.

Instead, the state court may choose to follow the *Polish Relief* case and the holding of this Court in *Lyon v. Singer*,

under which petitioner's attachment and judgment are valid. Such a choice would leave petitioner and respondent in hopeless confusion as to their respective rights. It would project the state and federal courts into an unseemly and irreconcilable conflict. This result can be avoided if certiorari is granted and the rights of the parties are finally determined by this court. Such a determination would also serve as a guide for the disposition of the many cases of attached frozen funds still pending. In New York County alone there are forty-nine such cases, involving \$16,548,-328.26. Appendix, pp. 30-33.

II.

The Holding Below Conflicts with This Court's Holding in *Lyon v. Singer* and *Lyon v. Banque Mellie Iran*, 339 U. S. 841, Decided June 5, 1950.

On June 5, 1950, three days after the holding below, this Court decided *Lyon v. Singer* and *Lyon v. Banque Mellie Iran*. Petitioner, by petition for rehearing, noted the conflict between the holding below and the *Singer* and the *Mellie Iran* cases. The court below, without opinion, denied rehearing (IIR p. 121).

In the *Singer* and *Mellie Iran* cases the New York State Court of Appeals followed the *Polish Relief* case. It held that an unlicensed voluntary transaction, in blocked Japanese funds, gave rise to valid rights in the transferee of the blocked property such as would enable him to assert a valid preferred claim (enforceable *in rem*, *Ticonic National Bank v. Sprague*, 303 U. S. 406, 412) against the property of the blocked national (Yokohama Specie Bank) in liquidation proceedings conducted by the N. Y. Superintendent of Banking. It held, further, that the claim could not be paid until the payment was screened by license under the federal freezing controls (293 N. Y. 542, 299 N. Y. 113). The freezing controls, it said, "did not prevent the accrual or creation of the claim sued upon or render such

claim void, but merely prevented the payment of the claim until an appropriate federal license is obtained" (299 N. Y. 790, 791).

This court, by affirming the *Singer* and *Mellie Iran* cases,^{11a} sanctioned these views and rejected the very arguments—made in those cases by respondent as *amicus*—which were advanced by respondent below. We believe it is fair to say that this court, in affirming these cases,

1. has approved the position of the New York Court—first espoused in the *Polish Relief* case—that the freezing controls did not prevent the accrual of rights based upon transactions in frozen funds so long as the transactions were not consummated until licensed, i.e., "screened and found to be consonant with the national interests", and

2. has, in effect, approved the doctrine of the *Polish Relief* case and rejected the doctrine of the holding below, which is directly to the contrary.

Petitioner's case not only parallels *Singer* and *Mellie Iran* but, in a decisive aspect, is decidedly stronger. In *Singer* and *Mellie Iran* the blocked transaction which was enforced was a voluntary one between two blocked nationals, "the foreign office of the Yokohama bank and Standard's Japanese office, both nationals of Japan, and was to be performed at the direction of the foreign bank" (299 N. Y. 113, 123). The transaction was wholly unauthorized under the freezing controls. Here, petitioner, an American citizen, attached the funds of the German banks *in invitum* and pursuant to admitted Treasury authority.

If, in *Singer* and *Mellie Iran*, the *unauthorized* transaction there involved gave rise to enforceable rights, it follows, *a fortiori*, that petitioner's attachment, *authorized under the freezing controls*, gave rise to a valid attach-

^{11a} This Court upheld *Singer's* claim even though the Secretary of the Treasury twice refused to license the transaction upon which it rested.

ment lien. In deciding to the contrary, the court below held directly in conflict with the *Singer* and *Mellie Iran* cases. There is no reason why the unauthorized voluntary transactions between blocked nationals in *Singer v. Lyon* should stand on firmer ground than petitioner's federally authorized attachment effected here under the supervision of the state court. Such supervision would insure a more perfect adherence to the purpose of the controls than could possibly be achieved by the parties in the *Singer* and *Mellie Iran* cases in their voluntary unsupervised and unauthorized dealings.

In choosing *Propper v. Clark*—instead of the *Singer* and *Mellie Iran* cases—as its guide, the court below overlooked the fundamental distinctions which deny the application of the *Propper* case here. *Propper* “claimed title to frozen assets adversely to the Custodian and sought to deny the Custodian’s paramount power to vest” (339 U. S. 841, 842-843). Here, petitioner did neither.

Firstly, petitioner claimed only the attachment lien which—under New York law and generally—left title to the attached funds undisturbed and in the German banks (Brief, *infra*, p. 51).

Secondly, here, as in the *Singer* and *Mellie Iran* cases, the Custodian’s “paramount power to vest” was not in issue. The Custodian’s vesting orders here were limited ones. They extended only to the right, title and interest remaining in the German banks in the attached accounts after giving effect to petitioner’s attachment. It is admitted that the Custodian’s limited vesting orders invited an adjudication of petitioner’s interest in the accounts by reason of the attachment.¹² And the Custodian so intended. Had

¹² In his brief in the District Court (p. 4) respondent said:

“Vesting Orders Nos. 7792 and 7870 in issue on this Petition vested the debts or other obligations arising out of bank accounts in the names of Deutsche Reichsbank and Deutsche Golddiskontbank maintained by the Chase National Bank, leaving open for subsequent judicial determination the amount of the debts actu-

he issued *res vesting* orders determining that the attached accounts were enemy property in their entirety and demanding the whole of the accounts, these unlimited vesting orders and demands would have been incontestable. However, such vesting orders would have left petitioner free to assert and enforce his attachment lien, as against the Custodian, in a proceeding under Sec. 9 of the Trading with the Enemy Act. *Central Union Trust Co. v. Garvan*, 254 U. S. 554, 569; *Stoehr v. Wallace*, 255 U. S. 239, 245-246. By choosing to vest only the right, title and interest of the German banks, the Custodian waived his right to immediate preliminary custody of the vested property and invited an adjudication which would—and here does—preclude a later Section 9 suit by petitioner. Since the Custodian deliberately chose not to put in issue his paramount power to vest by means of *res vesting* orders, there is no parallel between the instant case and the *Propper* case.

On the contrary, this case is precisely like the *Singer* and *Mellie Iran* cases. In those the Custodian vested the assets of the New York agency of the Yokohama Specie Bank "in the hands of the Superintendent remaining after the payment by the Superintendent of the creditors entitled to share in the liquidation of the New York Agency" (299 N. Y. 113, 125). This parallels, precisely, the scope of the vesting orders in the instant case which extends to the residue remaining in the Chase accounts of the German banks after giving to petitioner's attachment the force required by law.

ally owing to the German banks, and the valid ownership interests, if any, acquired in the accounts by third persons. In fine, the Custodian purported to vest only whatever interest the German banks might have had in the account, for there was no finding, that prior to vesting, the German nationals were in truth entitled to the entire balances of the accounts as stated on the books of the Chase National Bank. While demand letters (Exhibits D and F) were served by the Custodian upon the Chase National Bank, these demands are not regarded by the Attorney General as equivalent to the customary Turn-over Directives which, if issued in this case and taken together with the 'interest' Vesting Orders, would have been considered as giving him title to a specific *corpus* represented by the accounts."

It is respectfully submitted that certiorari be granted to eliminate the conflict between the holding below and the *Singer* and *Mellie Iran* cases.

III.

The Holding Below Subjects to Possible Double Liability Every Attachment Debtor Who Has Satisfied a Judgment Out of Attached Blocked Funds.

Respondent argued successfully below that, though the Treasury authorized the attachment of blocked funds, such an attachment would be wholly ineffective until payment of the ensuing judgment were licensed. The Treasury's post judgment license, he claimed, would validate the authorized—though void—attachment, *ab initio*.

The Constitution forbids this view. Under the Fourteenth Amendment, as construed in *Pennoyer v. Neff*, 95 U. S. 714, a judgment against a non-resident, resting on constructive service, is valid only if property has been seized, as by attachment, at the commencement of the suit and only to the extent of the property so seized. In the absence of such a seizure, the judgment is void. It cannot be validated by post-judgment events.

In *Pennoyer v. Neff*, *supra*, this Court decided that, only because the attachment has seized the property at the outset of the action and brought it under the control of the court, does the Federal Constitution permit a judgment binding the property seized. The power of the court to adjudicate "at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment". *Pennoyer v. Neff*, *supra*, p. 728. To paraphrase *Pennoyer v. Neff*, *supra*, p. 78, "The judgment, if void when rendered, will always remain void; it cannot occupy the doubtful position of being 'valid' if licensed by the Treasury under the freezing controls and 'void if there be' no license.

Since, under *Pennoyer v. Neff*, the validity of the judgment rests upon federal constitutional requirements and since these demand a valid attachment at the inception of the suit, the lower court's view of the freezing controls as precluding such an attachment would make it impossible to have a valid judgment based upon an attachment of blocked funds. A post-judgment Treasury license could, in no way, cure the constitutional defect. The holding below is an invitation to every blocked national, whose blocked funds have been applied to satisfy a judgment secured by attachment of those funds, to sue his creditor and the Sheriff for having paid on a void judgment. The potential double liability is large. In New York County alone more than \$2,000,000 have been paid out of attached blocked funds to satisfy such judgments (Appendix, pp. 31-32).

We respectfully submit that it is of first importance that certiorari be granted so that the validity of an attachment of frozen funds may be finally determined. Such a determination will set at rest the doubts raised by the holding below as to the validity of judgments already satisfied. Also, it will furnish a final guide for disposition of the many pending attachment cases of which some 49 are pending in New York County alone (Appendix, pp. 31-32).

IV.

Under Settled Rules of Law the District Court Should Have Refused to Entertain This Cause.

The District Court, by its judgment, has voided the state court judgment and the attachment upon which it rests. Had the German banks sued in the District Court to invalidate the state court judgment and attachment, the District Court would have been bound to refuse to entertain the suit because—

- (a) the state court judgment was immune to collateral attack under the full faith and credit clause of the Federal Constitution as well as judicial precedent;
- (b) in deference to the traditional rule of comity between state and federal courts in contests over a *res*, the district court could not interfere with the state courts' custody and control of the attached debts, made effective here by statutory injunction;
- (c) an adequate summary remedy was available in the prior state court proceeding.

Respondent was similarly limited since he had seized only the right, title and interest of the German banks and was in privity with them.

To avoid duplication, we respectfully refer the Court to the law applicable to this point which is fully discussed in the annexed Brief, *infra*, pp. 54-61.

CONCLUSION

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the U. S. Court of Appeals for the Second Circuit, commanding said Court to certify and send up to this Court a full and complete transcript of the record, and of all proceedings in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of said Court of Appeals be reversed; and that petitioner may be granted such other and further relief as may be just and proper.

Respectfully submitted,

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APPENDIX

1. Joint Resolution of May 7, 1940, 54 Stat. 179

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (b) of section 5 of the Act of October 6, 1917 (40 Stat. 411), as amended, is hereby amended to read as follows:

"During time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by or to banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, and any transfer, withdrawal or exportation of, or dealing in, any evidences of indebtedness or evidences of ownership of property in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest, by any person within the United States or any place subject to the jurisdiction thereof; and the President may require any person to furnish under oath, complete information relative to any transaction referred to in this subdivision or to any property in which any such foreign state, national or political subdivision has any interest, including the production of any books of account, contracts, letters, or other papers, in connection therewith in the custody or control of such person, either before or after such transaction is completed."

SEC. 2. Executive Order Numbered 8389 of April 10, 1940, and the regulations and general rulings issued thereunder by the Secretary of the Treasury are hereby approved and confirmed.

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2: Executive Order No. 8389, April 10, 1940, 5 F. R. 1400, as amended by Executive Order No. 8785, June 14, 1941, 6 F. R. 2897

SECTION 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarking of gold or silver coin or bullion or currency by any person within the United States;

E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

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3. General Ruling No. 12, April 21, 1942, 7 F. R. 2991

(1) Unless licensed or otherwise authorized by the Secretary of the Treasury (a) any transfer after the effective date of the Order [Exec. Order No. 8389] is null and void to the extent that it is (or was) a transfer of any property in a blocked account at the time of such transfer; and (b) no transfer after the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account (irrespective of whether such property was in a blocked account at the time of such transfer).

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(3) Unless otherwise provided an appropriate license or other authorization issued by the Secretary of the Treasury before, during, or after a transfer shall validate such transfer or render it enforceable to the same extent as it would be valid or enforceable but for the provisions of section 5(b) of the Trading with the Enemy Act, as amended, and Order, regulations, instructions and rulings issued thereunder.

(4) Any transfer affected by the Order and/or this general ruling and involved in, or arising out of, any action or proceeding in any Court within the United States shall, so far as affected by the Order and/or this general ruling, be valid and enforceable for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated: *Provided, however,* That no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in a blocked account, than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license.

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4. New York Judiciary Law

§ 750. Power of courts to punish for criminal contempts.

A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:

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3. Wilful disobedience to its lawful mandate.

§ 753. Power of courts to punish for civil contempts.

A. A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases:

.

3. A party to the action or special proceeding, an attorney, counsellor, or other person, for the non-payment of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution cannot be awarded for the collection of such sum; or for any other disobedience to a lawful mandate of the court.

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8. In any other case, where an attachment or any other proceeding to punish for a contempt, has been usually adopted and practiced in a court of record, to enforce a civil remedy of a party to an action or special proceeding in that court, or to protect the right of a party.

5. New York Civil Practice Act

§ 520. Judgment against non-resident enforceable only against attached property.

Where a defendant who has not appeared is a non-resident of the state, or a foreign corporation, and the summons was served without the state, or by publica-

tion pursuant to an order obtained for that purpose, the judgment can be enforced only against the property which has been levied upon by virtue of a warrant of attachment at the time when the judgment is entered. But this section does not declare the effect of such a judgment with respect to the application of any statute of limitation.

§ 645. Requisites of execution where warrant of attachment levied.

Where a warrant of attachment issued in the action has been levied by the sheriff, the execution must substantially require the sheriff to satisfy the judgment as follows:

1. Where the judgment debtor is a non-resident, or a foreign corporation, and the summons was served upon him or it, without the state, or otherwise than personally, pursuant to an order obtained for that purpose, and the judgment debtor has not appeared in the action; out of the personal property attached, and, if that is insufficient, out of the real property attached.

§ 916. The attachment may also be levied upon:

* * * * *

3. A debt, arising under or on account of a contract, not represented by a bond, promissory note or other instrument for the payment thereof, negotiable or otherwise, whether or not the said debt is past due, or yet to become due; to a resident or non-resident person or corporation, from a resident or non-resident person or corporation, upon whom or which service of process may be had within the county, provided that an action could be maintained by the defendant within the state for the recovery of such debt at the maturity thereof or where the debt consists of a deposit of money not to be repaid at a fixed time but only upon a special demand, that such demand therefor could be duly made by defendant within the state. The levy of the attachment thereon is deemed a levy upon, and a seizure of all the rights of the defendant in or to the said debt.

§ 917. A levy under a warrant of attachment must be made as follows:

2. Upon other property subject to attachment, as follows: Where the property consists of a demand, other than as hereinafter specified, by leaving a certified copy of the warrant with the person against whom it exists: * * *

A levy made by service of a certified copy of a warrant of attachment shall apply to any and all property of the defendant or debt owing to him, or to any interest of the defendant therein or thereto, subject to attachment, held or owed by the person on whom it is served, except that the levy shall not apply to such property, debt or interest, if the said person has no knowledge or reason to believe that the said property or debt belongs, or is owing, to the defendant, or is claimed by him or on his behalf, or that he has, or claims to have, an interest therein, unless such property, debt, or interest therein shall be specified in a writing accompanying the certified copy of the warrant.

Any such person so served with a certified copy of a warrant of attachment is forbidden to make or suffer, any transfer or other disposition of, or interfere with, any such property or interest therein so levied upon, or pay over or otherwise dispose of any debt so levied upon, or sell, assign or transfer any right so levied upon, to any person, or persons, other than the sheriff serving the said warrant until ninety days from the date of such service, except upon direction of the sheriff or pursuant to an order of the court. Any such payment, sale, assignment or transfer shall nevertheless be valid as to the payee or transferee in good faith thereof, and without notice that the warrant has been served.

§ 922. Actions and special proceedings by sheriff.

1. In the event that the person owing any debt to the defendant, or holding property, effects or things in action of the defendant or interest therein subject to attachment, on which a levy under a warrant has been made, as in this act provided, shall fail or refuse to deliver such personal property attached, or to pay

or assign to the sheriff the said debt, effect or thing in action, or interest therein, the sheriff may, and if indemnified by the plaintiff as hereinafter provided, must, within ninety days after the service of the certified copy of the warrant on such person, commence an action or special proceeding to reduce to his actual custody all such personal property capable of manual delivery, and to collect, receive and enforce all debts, effects and things in action attached by him, and may maintain any such action or special proceeding in his name or in the name of the defendant for that purpose. He may discontinue such an action or special proceeding at such time and on such terms as the court or judge directs. * * *

The service of process commencing such action or special proceeding against any person upon whom a certified copy of a warrant of attachment shall have been served, shall continue as against that person during the pendency of said action or special proceeding all duties and liabilities imposed upon him in the first instance by the service of the said warrant of attachment upon him.

The time within which such action or special proceeding, as hereinbefore provided, may be commenced shall be extended beyond the period of ninety days from the date of the service of the said warrant only by order of the court for good cause shown. Such an order may be granted upon ex parte application of plaintiff. An order thus extending the time within which such an action or special proceeding may be commenced shall be effective to continue all duties and liabilities of any person on whom a warrant of attachment in the action has been served, provided that a certified copy of the said order is served upon said person prior to the expiration of the said ninety days or prior to the expiration of the time for commencing such an action or special proceeding as further extended.

§ 948. The defendant, or the person upon whom a warrant of attachment has been served, or a person who has acquired a lien upon or interest in his property after it was attached, may apply, at any time before the actual application of the attached property

or the proceeds thereof to the payment of a judgment recovered in the action, to vacate or modify the warrant, or to increase the security given by the plaintiff, or for one or more of those forms of relief, together or in the alternative.

§ 969. Satisfaction of judgment from attached property.

Where an execution against property is issued upon a judgment for the plaintiff in an action in which a warrant of attachment has been levied, the sheriff must satisfy it as follows:

1. He must pay over to the plaintiff all money attached by him, and the proceeds of all sales of perishable property or of any vessel or share or interest therein, or animals, sold by him, or of any debts, or other things in action collected or sold by him; or so much thereof as is necessary to satisfy the judgment.

.

4. Until the judgment is paid, he may collect the debts and other things in action attached, and prosecute any undertaking, which he has taken in the course of the proceedings, and apply the proceeds thereof to the payment of the judgment.

6. Correspondence between Petitioner's Counsel and the Sheriff of the City of New York

July 25, 1950

Sheriff of the City of New York,
Hall of Records,
New York, N. Y.

Attention: Mr. Posner

Dear Sir:

I am preparing a petition to the Supreme Court of the United States for a writ of certiorari. The case involves the attachment of blocked funds. I desire to place before the Supreme Court the following facts:

(1) The total number of closed cases in New York County in which the Sheriff levied upon blocked

funds and the total sum of money paid out of blocked funds in such cases pursuant to post-judgment Treasury Department licenses.

(2) The total number of cases still pending in New York County in which the Sheriff has levied on blocked funds and the total amount still under attachment.

I shall appreciate it greatly if you will supply me with the mentioned facts.

Very truly yours,

JOSEPH M. COHEN

JMC:ah

CITY OF NEW YORK
OFFICE OF THE SHERIFF
Hall of Records
31 Chambers Street
New York 7, N. Y.
Worth 2-4300

SIDNEY POSNER
Counsel

August 18, 1950

Joseph M. Cohen, Esq.
36 West 44th Street
New York, 18, N. Y.

Re: McGrath v. Chase National Bank et al.;
McGrath v. Federal Reserve Bank et al.

Dear Mr. Cohen:

In response to your letter of July 25, 1950 in which you requested certain information concerning the attachment of blocked funds, we caused an examination to be made of the records in the New York County division of the Sheriff's Office.

This examination disclosed the following facts:

(1) The Sheriff had attachment levies upon blocked funds in at least 63 cases which were subsequently closed by payments made pursuant to executions upon judgments or court orders. These

payments, amounting to \$2,004,075.71, were authorized by Treasury Department licenses.

(2) There is now pending in New York County at least 49 cases in which, pursuant to warrants of attachment, the Sheriff has levied upon blocked funds or property in a reported amount of \$16,548,328.26 which does not include certain securities and other property of an undetermined value.

Very truly yours,

SIDNEY POSNER
Counsel

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PETITIONER'S BRIEF

Opinions Below

The opinion of the District Court for the Southern District of New York is reported at 82 F. Supp. 740 (IR 289). The opinion of the Court of Appeals for the Second Circuit is *per curiam* and is reported at 182 F. 2d 349 (IIR p. 99).

ARGUMENT

I.

By Issuing Right, Title and Interest Vesting Orders, Respondent Deliberately Limited His Seizure to the Residual Interest in the Attached Bank Accounts, Remaining in the German Banks After Giving Effect to Petitioner's Attachment. By Issuing Such Limited Vesting Orders, Respondent Chose to Submit to Judicial Determination the Quantum of That Residual Interest and to Forego His Right to Preliminary Custody of the Whole of the Attached Accounts.

Vesting orders are of two kinds. One—the so-called “*res*” vesting order—is a seizure of *designated property*. The other—the “right, title and interest” vesting order—seizes merely the *enemy's interest* in designated property.¹

¹ “Vesting action by the Custodian may take two forms. He may vest the ‘right, title, and interest’ of an enemy in and to property or he may issue a *res* vesting order by which he vests the asset itself. In *Stern v. Newton*, 39 N. Y. S. 2d 593, 598 (1943), the difference between the two orders was expressed in this fashion: ‘Where the Custodian seizes only the right, title

A *res vesting* order is a preliminary seizure. The property is taken by the Custodian irrespective of—but without prejudice to—the rights of others having claims against the property. The Custodian must respect the rights of others to the property as determined by a later suit under Sec. 9 of the Trading with the Enemy Act. *Central Union Trust Co. v. Garvan*, 254 U. S. 554, 569; *Stoehr v. Wallace*, 255 U. S. 239, 245-246.

A “right, title and interest” vesting order merely places the Custodian in the shoes of the enemy with respect to the designated property. The order is effective only if, and to the extent that, the enemy has an interest in the property. The enemy’s interest delimits the Custodian’s rights. The vesting order does not contract or enlarge that interest. *Kahn v. Garvan*, 263 Fed. 909, 912; *Miller v. Rouse*, 276 Fed. 715, 716; *U. S. v. The Antoinetta*, 153 F. 2d 138, 143; *Isenberg v. Trent Trust Co.*, 26 F. 2d 609, 613, aff’d on rehearing 31 F. 2d 553, cert. den. 279 U. S. 862; *Mayer v. Garvan*, 270 Fed. 229, 239; *In re People by Beha, Supt. of Ins.*, 256 N. Y. 177, 187, cert. den. 284 U. S. 633; *U. S. v. The San Leonardo*, 51 F. Supp. 107, 109; *The Pietro Campanella*, 47 F. Supp. 374, 377, 380; *Clark v. Edmunds*, 73 F. Supp. 390, 392-394; *Chase Nat. Bank v. Reinicke*, 76 N. Y. S. 2d 63, 65.

By a “right, title and interest” vesting order, the Custodian elects to have a determination of adverse interests in the property before it is taken into his custody. By a “*res*” vesting order, the Custodian elects to take immediate custody of the property and relegates the adjudication of

and interest of an enemy national, a question is presented as to the extent of that interest. * * * But where the Custodian vests the particular property, as distinguished from the interest of the enemy national in the property, he takes the entire right, title and interest therein, regardless of the quantum owned by the enemy national.”

Robert M. Vote. Estates and Trust Branch Office of Alien Property (1949), *Alien Property Litigation in World War II*, p. A-3.

adverse rights to a later suit under Sec. 9 of the Trading with the Enemy Act. *Kahn v. Garvan*, 263 F. 909, 912; *Stern v. Newton*, 39 N. Y. S. 2d 593, 598.

Here, the vesting orders are clearly of the "right, title and interest" variety. The judgment below so decrees (IR 312-313). Respondent so concedes. Thus, in his brief below (p. 5), respondent said:

" * * * The orders, however, contain no finding that prior to vesting the German banks were in truth entitled to the entire balances of the accounts as stated on Chase's books. Appellee agrees with appellants that the vesting orders in this case left open for subsequent judicial determination the amount of the debts actually owing to the German banks and the valid ownership interests, if any, acquired in the accounts by third persons. The Custodian has likewise conceded that the demand letters which he served upon Chase (IR 46-54, 64-72) are not equivalent to turn-over directives which, had they been issued in implementation of the vesting orders, would have constituted a determination that a specific designated corpus was enemy property required to be delivered to the federal authorities. * * * "

Since here the Custodian chose to waive his right to immediate custody and to have a judicial determination of adverse rights in the vested property at the outset, the issue is simply this: What interest did the German banks have in the Chase accounts on the effective dates of the vesting orders?

Petitioner says that he validly attached the Chase accounts. The attachment impressed a lien upon these accounts to secure his judgment.² Therefore, when the later vesting orders were made, the interest of the German banks in the Chase accounts was limited to the residuum, if any, remaining after satisfaction of his attachment lien. The Custodian took only this residuum—no more.

² See *post* p. 51, note 17.

Respondent would agree, except for the impact of Executive Order No. 8389. In his brief in the District Court he said, "But for the impact of Executive Order No. 8389 as amended, and regulations of the Treasury Department issued pursuant thereto, it is conceded that under the law of New York both the attaching creditors and the Sheriff would have acquired liens on the applicable funds through the attachments and levies". However, he said, "the application of the Executive Order prior to the issuance of the attachment and levies barred the acquisition of any interest by the respondents in the property through judicial process or otherwise".

The merits of the case turn upon whether, under the freezing controls of Executive Order 8389 as applied by the Treasury Department, frozen funds could be validly attached.

II.

The Attachment of Frozen Funds Was Permitted by the Freezing Control Program.

Petitioner attached on December 11, 1941. The levy preceded war with Germany.³ The Trading with the Enemy Act was not then in force as to Germany.⁴ At that time, the Custodian was without power to vest the attached property. The United States, neither directly nor through any agency, did, or could, claim any proprietary interest in the attached accounts.

Petitioner's attachment created no contest between himself and the United States. The parties to the state court litigation were—and remained throughout—petitioner as plaintiff and the German banks as defendants.

³ Petitioner attached on December 11, 1941, at 2:41 P. M., Eastern Standard Time (269). War with Germany began on December 11, 1941, at 3:05 P. M., Eastern Standard Time (55 Stat. 796).

⁴ See *post*, p. 38, note 6.

Except for the later limited vesting orders, respondent would have no standing to question the validity of the attachment. By these orders, he deliberately chose the status of successor to the rights of the German banks. He asserts their rights as their privy. It is as if the German banks were here contesting the validity of petitioner's attachment made on December 11, 1941. If they could not prevail, neither can respondent.

The German banks could not have employed the freezing controls to defeat the attachment because—

(a) the freezing controls were protection against—not for—German nationals,

(b) in authorizing the attachment of frozen funds, the Secretary of the Treasury must be taken to have sanctioned a valid attachment, and

(c) petitioner's attachment is clearly valid under this Court's holding in *Lyon v. Singer* and *Lyon v. Banque Mellie Iran*.

A.

The freezing controls were designed to protect, against Axis conquest, property here belonging to nationals of the invaded countries. Suits by Americans against frozen property were not proscribed.

The freezing controls rest upon the authority given to the President by Sec. 5(b) of the Trading with the Enemy Act.⁵

⁵ Sec. 5(b) was enacted originally in 1917 as part of the Trading with the Enemy Act [40 Stat. 411, Sec. 5(b)]. It was a catch-all enabling control of transactions not otherwise controlled by that act. The end of the first World War terminated the effectiveness of Sec. 5(b) as well as the other controls of the Trading with the Enemy Act.

Sec. 5(b)—alone—was revised on March 9, 1933, to meet the domestic crisis engendered by the depression. On that day, it was amended so that the powers granted would be available to the President in war or "during any other period of national emergency de-

When Germany invaded Norway and Denmark, the President declared a national emergency. This declaration reactivated his powers under Sec. 5(b) of the Trading with the Enemy Act. It enabled him to employ these powers to protect against German conquest securities and credits located here, belonging to Norway and Denmark and their nationals. The powers conferred by Sec. 5(b) were available to the President in time of "national emergency" as well as during time of war. The remainder of the Trading with the Enemy Act was effective only in war time.⁶

Acting under Sec. 5(b), on April 10, 1940, the President issued Executive Order 8389 (5 F. R. 1400), freezing designated property in the United States in which "Norway or Denmark" or any national thereof has at any time on or since April 8, 1940, had any interest."

To confirm and clarify the President's action, Senator Wagner, at the instance of the Treasury Department, introduced into Congress the Joint Resolution, enacted on May 7, 1940 (54 Stat. 179; Appendix, p. 23).⁷ Executive Order 8389 was an exercise by the President of the authority granted by this Joint Resolution. Initially, the Order dealt only with the local assets of Danish and Norwegian nationals. On June 14, 1941, the President extended its application to nationals of Germany, among others (Exec. Order 8785; 6 F. R. 2897). Executive Order 8389 followed,

clared by the President" (48 Stat. 1). The amendment was directed to the domestic crisis solely. The obvious purpose of the amendment was to enable the President to suspend payments by the banks to prevent the current runs and, thus, to halt the alarming numbers of bank failures.

⁶ The remainder of the Trading with the Enemy Act was reactivated as to Germany at midnight, December 11, 1941. *Trading with the Enemy Act*, § 2 (50 U. S. C. A., appendix); *Markham v. Cabell*, 326 U. S. 404, 407n. 2.

⁷ H. Rep. No. 2009, 76th Cong. 3rd Sess. 1940; S. Rep. No. 1946, 76th Cong. 3rd Sess. 1940; Sen. Wagner in 86 Cong. Rec., p. 5006.

closely, the language of the Joint Resolution. Sec. 1 of the Order—the portion material here—provides as follows (5 F. R. 1400, as amended June 14, 1941, 6 F. R. 2897):

“Section 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country, designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

“A. All transfers of credit between any banking institutions within the United States, and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside the United States);

“B. All payments by or to any banking institution within the United States;

.

“E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States.”

.

The Joint Resolution of May 7, 1940, did not empower the United States to seize any proprietary interest in frozen funds. Confiscation was constitutionally forbidden. *Russian Volunteer Fleet v. U. S.*, 282 U. S. 481, 491-2. It was intended merely to protect the assets here of Axis-invaded countries and their nationals from seizure by the Axis at

gun point.⁸ To this end the President was given the power to screen transactions in frozen property and to withhold sanction from those resting upon Axis conquest. Legitimate transactions were to be unaffected.⁹ The frozen property was to be subject to the claims of Americans.¹⁰

Thus, Congress established the freezing controls as an instrument to be used solely against Axis aggression. They were a check on the use of frozen property by the Axis—not a device to protect Axis funds from the legitimate claims of American citizens.

The Joint Resolution did not purport to restrict in any way the right of an American citizen to sue a blocked national *in personam* or by attachment of his funds. To

⁸ The Joint Resolution was offered in Congress by Senator Wagner, Chairman of the Committee on Banking and Currency, which had reported out of the Resolution. In his own words,

“ * * * The purpose of the joint resolution, of course, is very clear. We want to protect property within the jurisdiction of the United States which is owned by these governments [Norway and Denmark] or their nationals” (86 Cong. Rec. 5006).

See also: Sen. Glass in 86 Cong. Rec. 5175-5176 and Sen. Connally in 86 Cong. Rec. 5007.

⁹ “Mr. Wagner. * * * I wish to emphasize the point that *this does not absolutely prohibit the transfers, it merely provides that the Government may investigate to determine whether the transfer was made voluntarily or under duress, to be perfectly candid. If the transfer is voluntarily made, our Government, of course, will in no way interfere.* But where the transfer is induced, as can be easily established, by duress, we have a right to protect the national of any country against that sort of an imposition, using a very mild term, with respect to securities and other evidences of ownership subject to our laws” (86 Cong. Rec. 5007). (Italics supplied.)

“Mr. Wagner. *The joint resolution does not absolutely prohibit any transaction. It simply contemplates, if an Executive order is issued, that each transaction be scrutinized to determine whether it was bona fide or accomplished through duress.*” (Italics supplied.)

“Mr. Barkley. That is right” (86 Cong. Rec. 5175-5176).

¹⁰ Senators Barkley and Wagner in 86 Cong. Rec. 5006.

imply such a restriction would be to proscribe in peace what was clearly permitted even during the exigencies of war. It is settled—both at common law and under the Trading with the Enemy Act—that, despite the existence of war, a citizen has the right to sue the enemy and to attach his property. *Watts, Watts & Co. v. Unione Austriaca Navigazione etc.*, 248 U. S. 9; *Trading with the Enemy Act*, § 7(b); 137 A. L. R. 1369, note. Nothing in the peacetime Joint Resolution indicates any purpose to reverse this wartime rule. [Cf. Sec. 5(b), as enacted during the First World War (40 Stat. 411 and 40 Stat. 966) with the Joint Resolution (48 Stat. 1).] In essepee, this is conceded by respondent's stipulation that the attachment of frozen property "was not forbidden" by the freezing controls (IR 265) and that "a license to institute the action and levy the attachment was in fact not required" (IR 266).

Since the Joint Resolution permitted suit, including attachment actions, against blocked nationals or alien enemies, the German banks would have no standing to assert the freezing controls as a defense to petitioner's attachment. Respondent—as successor to the German banks—has no better right (*supra*, p. 34). In holding otherwise, the court below has unwittingly perverted the freezing controls from an instrument directed against German nationals to one designed for their protection. *Porter v. Freudenberg* [1915], 1 K. B. 857, 880.

B.

In authorizing the attachment of frozen funds, the Secretary of the Treasury must be taken to have sanctioned a valid attachment.

While, as just shown, the freezing controls did not embrace attachments of frozen funds, it would not matter here if the fact were otherwise. The Congressional Joint Resolution empowered the President to authorize transactions in frozen property, even if they were within the ambit of the Resolution. By Executive Order 8389, Sec. 7,

the President delegated this power to the Secretary of the Treasury. The manner in which the Secretary exercised this power in respect to the attachment of frozen funds is agreed upon here. The formal stipulation of fact in this case establishes the following:

1. From the inception of freezing controls the Secretary of the Treasury ruled that "the bringing of an action, the issuance of a warrant of attachment therein, and the levy thereunder upon blocked property found within the jurisdiction of the court which issued the warrant were not forbidden but that a license was required to be secured before payment could be made from the blocked account to satisfy any judgment recovered in such action" (IR 265).

2. "A license to institute the action [by attachment] and levy the attachment was in fact not required by the Treasury Department" (IR 266).

3. In all cases in which litigants proposed to sue by attachment and applied to the Treasury for a license to attach, the Secretary made it clear that no license was necessary by a ruling or instruction of the following nature:

"Under Executive Order No. 8389, as amended, and the Regulations issued thereunder, no attempt is made to limit the bringing of suits in the courts of the United States or of any of the States. However, should you secure a judgment against one of the parties referred to in your letter, which is a country covered by the Order, or a national thereof, a license would have to be secured before payment could be made from accounts in banking institutions within the United States in the name of such country or national" (IR 263-264).

4. The Treasury at various times licensed payments out of frozen funds to satisfy judgments in attachment actions, "notwithstanding that a particular license to institute the action and levy the attachment was not procured by a plaintiff and judgment-creditor" (IR 266).

The Treasury construed its ruling to mean that frozen funds could be validly attached. As *amicus curiae* in *Comm. for Polish Relief v. Banca Nationala a Rumaniei*, 288 N. Y. 332, the Treasury represented to the New York State Court of Appeals that "From the terms of the statement [quoted in the stipulation of fact here (IR 264)], it may be clearly seen that the Secretary of the Treasury authorized the bringing of an attachment action".¹¹ The Treasury advised the New York Court of Appeals to hold "that the Courts of the State of New York do have jurisdiction to litigate by attachment of blocked properties the rights and liabilities of litigants, consistent with the administration by the Federal Government of the freezing control laws."¹¹ The New York Court of Appeals so held in the *Polish Relief* case.

Respondent agrees. In his brief below (p. 24), he said:

"Appellants stress throughout their briefs that a license was not required to institute a suit by attachment. Appellee concedes this and has so stipulated" (266).

This concession, we believe, is decisive of the case.

Since it is agreed that petitioner's attachment was permitted, petitioner's attachment levy under New York law effected (a) a seizure of the attached funds [N. Y. Civ. Prac. Act, Sec. 916, Subd. 3], and (b) the creation of a lien upon the attached funds to secure petitioner's state court judgment.¹² Both the Trading with the Enemy Act and the Fifth Amendment require that these vested rights of the petitioner be respected. *Trading with the Enemy Act*, Sec. 8; *Security First Nat. Bk. v. Rindge Land & Navig.*

¹¹ Brief (p. 39), of Treasury Dept. as *amicus* in *Comm. for Polish Relief v. Banca Nationala a Rumaniei*, 288 N. Y. 332.

¹² Resort must be had to New York law to determine the incidents of petitioner's attachment. *Clark v. Williard*, 294 U. S. 211, 213. The New York cases holding that an attachment impresses a lien on the attached property are cited *post*, p. 51, footnote 17.

Co., 85 F. 2d 557, 561; *Louisville Bk. v. Radford*, 295 U. S. 555; *Gunn v. Barry*, 82 U. S. 610, 622.

To avoid this result—implicit in his concession—respondent took the position below that, although the Secretary of the Treasury authorized an attachment under New York law, the attachment was null and void when levied. It would become validated *ab initio*, he argued, if and when plaintiff's judgment in the attachment action were licensed for payment.

No such attachment is known to New York law. In New York—as in almost all other states—an attachment to be good, must seize the property and impress it with a lien before the judgment—not later.

Respondent's view would require a wholesale revision of the law of attachment. The Treasury's ruling—stipulated to here—indicates no purpose so to revise the attachment law of New York or of any of the states. Nothing in the Joint Resolution of May 7, 1940 or in Exec. Order 8389 granted such legislative power.

In truth, the states could not so revise their attachment laws even if thus minded. *Pennoyer v. Neff*, 95 U. S. 714, 727, forbids a judgment resting upon an attachment which has the attributes suggested by respondent. Under *Pennoyer*, it is only because the attachment has seized the property and brought it under the control of the court before judgment, that the Federal Constitution permits an adjudication binding the property seized. The power of the court to adjudicate "at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment." *Pennoyer v. Neff*, *supra*, p. 728. To paraphrase *Pennoyer v. Neff*, *supra*, p. 728, "The judgment, if void when rendered, will always remain void; it cannot occupy the doubtful position of being valid" if licensed by the Treasury, under the freezing controls, "and void if there be" no license.

It must be assumed that the Treasury understood these constitutional requisites of a valid attachment. The Treas-

ury's ruling must be construed to have authorized an attachment which would fulfill those requisites, i.e., an attachment effective when levied. It cannot be construed to have authorized the courts to proceed in a manner which the Federal Constitution forbade. *Josephberg v. Markham*, 2nd Cir., 152 F. 2d 644, 659; *Fed. Trade Com. v. Am. Tobacco Co.*, 264 U. S. 298, 307.

On December 11, 1941—when petitioner attached—the freezing controls rested wholly on the Joint Resolution. On that date there was no administrative interpretation of the impact of the controls on attachments except that found in the Treasury's ruling stipulated to here. This ruling stated clearly that the freezing controls made "no attempt to limit" attachments (IR 264). This ruling, alone, expressed the Treasury's then view as to the force of the Joint Resolution.

Below respondent argued otherwise. He said, in effect, that Gen. Ruling No. 12—issued on April 21, 1942, in implementation of the controls—must be applied retroactively to determine the meaning of the freezing controls on December 11, 1941, when petitioner attached. We cannot agree. Gen. Ruling 12 may be applicable to attachments made after the Ruling was issued on April 21, 1942. It cannot, in any legitimate sense, be used as the guide for construing the Secretary's earlier ruling—found in the stipulation here—in execution of the restricted authority of the Joint Resolution. The latter was the sole Congressional authority for the controls when petitioner attached on December 11, 1941.¹³ *Ex parte Endo*, 323 U. S. 283, 302.

We need not speculate as to the impact of Gen. Ruling 12 upon petitioner's attachment. It had none. Gen. Ruling 12 came on April 21, 1941—more than four months after petitioner had attached. Since it had the sanction

¹³ Under the holding in *Lyon v. Singer* and *Lyon v. Banque Mellic Iran*, 339 U. S. 841, even the First War Powers Act—enacted later—did not prevent the creation of valid rights in frozen funds as the result of unlicensed litigation.

of harsh criminal penalties (Exec. Order 8389, Sec. 8), the Constitution forbade its application retroactively to avoid petitioner's attachment. *Addy v. U. S.*, 264 U. S. 239, 244-245; *Chew Heong v. U. S.*, 112 U. S. 536.¹⁴ This was fully appreciated by this Court, which said in *Propper v. Clark*, 337 U. S. 472, 485:

"General Ruling No. 12, as it came after the suit by the receiver against ASCAP was started and after the order appointing petitioner as permanent receiver, is not treated by us as decisive in this case. It is useful only as a statement of the administrative determination as to the effect of the litigation without a license."

The validity of petitioner's attachment depends solely upon the impact of the freezing controls authorized by the Joint Resolution of May 7, 1940. These were the peace-time controls; there were then no others. The status of attachments under the Joint Resolution is explicitly defined by the Treasury's ruling as stipulated here. As interpreted by this ruling, nothing in the Joint Resolution or the Executive Order forbade petitioner's attachment.

Even if the Constitution did not forbid the retroactive application of Gen. Ruling 12, the ruling itself, properly construed, sanctioned petitioner's attachment on December 11, 1941. Subd. (3) of Gen. Ruling 12 provides that a transfer, if, at any time, licensed or otherwise authorized by the Secretary of the Treasury is "enforceable to the same extent as it would be valid or enforceable but for . . . section 5(b) of the Trading with the Enemy Act", Exec. Order 8389 and regulations issued thereunder. Since, concededly, petitioner's attachment was so authorized it is expressly validated by Gen. Ruling 12.

¹⁴ Apart from constitutional limitations, Gen. Ruling 12 could not be given retrospective force. Administrative orders and rulings, as well as statutes, are not construed to operate retrospectively. *Miller v. U. S.*, 294 U. S. 435, 439; *Standard C. & M. Corp. v. Waugh C. Corp.*, 231 N. Y. 51.

Further, subd. (4) of Gen. Ruling 12 expressly makes "valid and enforceable" any transfer involved in, or arising out of any court proceeding "for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated". In every attachment action the right of the Court to attach the property is necessarily one of the matters litigated and concluded by the judgment. *Ackerman v. Tobin*, 8th Cir., 22 F. 2d 541; *Green v. Van Buskirk*, 74 U. S. 139, 148. Therefore, the state court's judgment in favor of petitioner against the German banks was an adjudication, binding on the German banks, that the funds were validly attached. As respondent was in privity with the German banks, he is equally bound by the judgment in the attachment action.

Respondent ignored the language of subd. (3) and sought to give subd. (4) a different twist. He said, in his brief below (p. 19), that subd. (4), in permitting an adjudication of the rights and liabilities of the parties, must be read—due to the proviso—as relating the property in litigation from any of the consequences of the litigation until the judgment is licensed. The difficulty with this construction of subd. (4) is that, in practice, it would bring about utterly conflicting consequences, dependent upon whether the litigation were *in personam* or *in rem*—a result wholly unintended by anything which appears anywhere in the Ruling.

The Ruling purports to permit actions competent validly to determine "the rights or liabilities therein litigated". Respondent's construction of the Ruling would not interfere with this purpose in the case of *in personam* actions. In such case, the personal service of the summons would provide the constitutional basis for a binding judgment fixing the rights of the parties. In such case, the validity of the judgment would in no way depend upon whether a post-judgment, unlicensed, judicial seizure, by execution, garnishment, etc., was effective to create an interest in frozen funds.

In the case of *in rem* actions, proceeding on constructive service, precisely the opposite would be true. In such cases

the constitutional prerequisite to a binding judgment fixing the rights of the parties is the judicial seizure, *in limine*, of the property to be dealt with by the judgment. This is because, where the action is *in rem*, the rights of the parties are determined only in respect to the property seized prior to the judgment.¹⁵ If, as respondent contends, the proviso of subd. (4) precludes a valid pre-judgment attachment, no valid *in rem* judgment would be possible, despite the absence in Gen. Ruling 12 of any purpose to differentiate between actions *in rem* and actions *in personam*.

To construe the Gen. Ruling as authorizing a valid attachment of frozen funds for jurisdictional purposes is to make it valid and meaningful. To construe it as respondent contends is to make it illogical, contradictory and opposed to the dictates of the 14th Amendment.¹⁶ Given this choice, the interpretation which is meaningful and constitutional should be adopted. *Burnet v. Chicago Portrait Co.*, 285 U. S. 1, 16; *Texas & P. R. Co. v. U. S.*, 289 U. S. 627, 640; *U. S. v. La Franca*, 282 U. S. 568, 574; *Josephberg v. Markham*, 152 F. 2d 644, 659.

There were practical reasons why the Secretary of the Treasury, in authorizing the attachment of frozen funds, should have intended a valid attachment. His, alone, was the responsibility of issuing or withholding the license needed before frozen funds could be applied to satisfaction of the judgment recovered in the attachment action. It was to his interest—as well as to that of the litigants—that the judgment, payment of which was to be licensed, should have no patent infirmity.

¹⁵ The pertinent cases are cited at p. 49.

¹⁶ *Pennoyer v. Neff*, *supra*. Also, under respondent's construction, Gen. Ruling 12 would appear to violate the Fifth Amendment as being too contradictory "to be intelligible". *Small Co. v. American Sugar Refining Co.*, 267 U. S. 233; *U. S. v. Cohen Grocery Co.*, 255 U. S. 81; *Standard C. & M. Corp. v. Waugh C. Corp.*, 231 N. Y. 51; *Weeds, Inc. v. U. S.*, 255 U. S. 109; *Cline v. Frink Dairy Co.*, 274 U. S. 445. Cf. *U. S. v. Shreveport Grain & E. Co.*, 287 U. S. 77.

Such judgments, resting wholly on the attachment of frozen funds, would be patently void if frozen funds could not be validly attached. It is elementary law that a judgment in an attachment action is constitutionally binding only if property has been actually attached prior to the entry of the judgment and only to the extent of the property so attached. *Pennoyer v. Neff*, 95 U. S. 714, 727, 728; *Pennington v. Fourth Nat. Bk.*, 243 U. S. 269, 272; *Helme v. Buckelew*, 229 N. Y. 363, 371; *Matthews v. Matthews*, 247 N. Y. 32, 34.

By ruling that frozen funds could be validly attached, the Secretary removed all doubt as to the Constitutional validity of the judgment without impairing, in any way, his ability and right to screen the payment of the judgment for compliance with the policy underlying the freezing controls.

Both the Treasury and the Alien Property Custodian have licensed the transfer of attached frozen funds to satisfy judgments obtained in actions begun by unlicensed attachment of such funds (IR 266-269). Such action is inexplicable except upon the hypothesis that a valid attachment of frozen funds was permitted. Unless the attachment were valid, the judgment would be a nullity under *Pennoyer v. Neff*. It cannot be supposed that the Secretary, in ruling that a license was required to satisfy the judgment, meant to reserve the authority to license as valid payment of a judgment resting upon an attachment which would be a nullity under the construction of the controls attributed to him by respondent. The Treasury would have no occasion to license execution upon a void judgment. There would, indeed, be nothing to license.

There is no basis in law or policy for permitting respondent, in effect, to revoke, retroactively, the explicit authority to attach frozen funds granted by the Secretary of the Treasury from the very inception of the freezing controls.

C.

Petitioner's attachment is clearly valid under this Court's holding in *Lyon v. Singer* and *Lyon v. Banque Mellie Iran*.

In *Lyon v. Singer* and *Lyon v. Banque Mellie Iran*, 339 U. S. 841, this Court affirmed the holding of the New York State Court of Appeals. The latter Court held that a voluntary unauthorized transfer of blocked Japanese funds gave rise to valid rights in the transferee, enforceable as a preferred claim against the assets of the Yokohama Specie Bank in liquidation. 293 N. Y. 542; 299 N. Y. 113; 299 N. Y. 139. The freezing controls, said the New York Court in amending its remittitur, "did not prevent the accrual or creation of the claim sued upon or render such claim void, but merely prevented the payment of the claim until an appropriate federal license is obtained * * *." 299 N. Y. 790 and 791.

This Court having affirmed in *Singer* and *Mellie Iran*, it was obligatory upon the Court below to hold that the freezing controls "did not prevent the accrual or creation of" petitioner's attachment lien or render such lien void, "but merely prevented the payment of the" judgment "until an appropriate federal license is obtained". In truth, petitioner's case is *a fortiori*. Concededly, petitioner's attachment was authorized by the Treasury whereas the transaction in *Singer* and *Mellie Iran* was unauthorized.

The Court below mistakenly assumed that this case was controlled by *Propper v. Clark*, 337 U. S. 472. The validity of such an assumption is destroyed by this Court's holding in *Singer* and *Mellie Iran* that the authority of the *Propper* case is limited to a "claim of title to frozen assets adversely to the Custodian", by one seeking "to deny the Custodian's paramount power to vest". 339 U. S. 841, 842-3. The instant case is distinguishable from the *Propper* case in both aspects.

- 9 (1) Petitioner's attachment—in contrast to the receivership order in the Propper case—involved no claim of title. It created only the attachment lien required for in rem jurisdiction.

Under New York law, the levy of an attachment impresses a lien upon the attached funds at the outset of the action.¹⁷ In this way, the preliminary seizure, constitutionality necessary for *in rem* jurisdiction is achieved and the attachment action can proceed.¹⁸ Title to the attached funds—despite the attachment—remains in the defendant.¹⁹ Therefore, the attachment effects no transfer. There is no shift in title—as in *Propper v. Clark*—which requires the sanction of the Treasury under the Executive Order.

If the plaintiff in the attachment action recovers a judgment, the attached funds, when execution issues against them, are applied in satisfaction of the judgment (N. Y. *Civ. Prac. Act*, §§ 969, 645). If execution issues, then

¹⁷ The effect of an attachment under New York law is well established: The levy of the warrant impresses a lien upon the attached property as "security for the judgment the plaintiff may recover." If the plaintiff recovers, "the lien becomes absolute, relating back to the time of the levy, and taking its priority from that date." *Fielmaier v. Brunner* (1st Dept. 1874), 2 Hun 354, 356; *Van Camp v. Searle* (5th Dept. 1894), 79 Hun 134, 143, mod. 147 N. Y. 150; *Lynch v. Crary*, 52 N. Y. 181, 184; *Embree v. Hanno*, 5 Johns. 101, 103; *Logan v. Greenwich Trust Co.* (1st Dept. 1911), 144 App. Div. 372, 378, aff'd 203 N. Y. 611; *West Virginia P. & P. Co. v. People's Home Journal, Inc.* (1st Dept. 1931), 233 App. Div. 376, 378; *Sanders v. Armour Fertilizer Works*, 292 U. S. 190, 208; *Elkay Reflector Corp. v. Savory, Inc.* (C. C. A. 2nd, 1932), 57 F. 2d 161; *Steingut v. Nat. City Bk.* (S. D. N. Y. 1941), 38 F. Supp. 451, 452.

¹⁸ *Pennoyer v. Neff*, 95 U. S. 714, 727, 728, 733; *Security Savings Bk. v. California*, 263 U. S. 282, 287; *Pennington v. Fourth Nat. Bk.*, 243 U. S. 269, 272; *Helme v. Buckelew*, 229 N. Y. 363, 371; *Matthews v. Matthews*, 247 N. Y. 32, 34.

¹⁹ *Klinck v. Kelly*, 63 Barb. 622; *Columbia Bank v. Ingersoll* (Sup. Ct. N. Y. 1888), 21 Abb. N. Cas. 241; *Starr v. Moore*, 22 F. Cas. No. 13315, 3 McLean 354. This is the rule generally. See 7 C. J. S., page 415.

only—for the first time in the attachment action—does title to the attached frozen funds become involved in the litigation. At the point of execution—and here alone—the freezing controls apply. It is the execution against the frozen funds which portends the change in title. It is the execution—not the attachment or judgment—which must be licensed under the Treasury's ruling. Until execution upon the judgment, there has been, and can be, no transfer of title as in *Propper v. Clark*, *supra*.²⁰ Here, it is conceded that execution has not issued (IR 20).

Since everything done by the state court, including entry of petitioner's judgment, was concededly authorized by the Secretary of the Treasury, since execution has not issued and since the parties are agreed that execution cannot issue without an appropriate federal license, it is clear that the proceedings in the state court have in no way impinged upon the federal controls. So this Court has held in the *Singer* and *Mellie Iran* cases. These cases—not *Propper v. Clark*—should have been followed below.

(2) Only the rights of the German banks—not the Custodian's vesting power—is in issue here.

Had the Custodian issued a "res" vesting order, seizing the attached bank accounts in their entirety, that order would have been incontestable (*supra*, p. 34).

Here, however, the Custodian chose to seize only the interest of the German banks in the attached accounts. The choice was deliberately made. The "right, title and interest" vesting order submits for judicial determination the extent of the enemy's interest in the seized property. Whether the Custodian chose this type of vesting order to obviate a later proceeding under Sec. 9 of the Trading with the Enemy Act or to secure a precedent for disposition of

²⁰ In the *Propper* case, the receiver not only claimed title to the New York assets of AKM, vested in him by the state court judgment, but sought to enforce that judgment by suing on it to compel ASCAP to pay to the receiver, without Treasury license, ASCAP's debt to AKM in satisfaction of the state court judgment.

the many similar attachment cases still pending, is unimportant here. Having chosen to enforce only the rights of the German banks, no issue is presented as to the paramountcy of the Custodian's vesting power. Only the rights of the German banks is at issue.

It is true, of course, that, if petitioner prevails and a federal license is ultimately issued, the *quantum* of the Custodian's seizure is diminished to the extent of petitioner's attachment lien. But the Custodian would have to respect that lien even if he issued a "res" vesting order, for under such a vesting order he would hold the seized property subject to petitioner's right to enforce his lien in a Sec. 9 proceeding. The vesting power is limited by the Fifth Amendment. The latter permits nothing less. *Miller v. Kaliwerke*, 283 Fed. 746, 757-758; *Commercial T. Co. v. Miller*, 281 Fed. 804, 806; *aff'd* 262 U. S. 51; *Becker Steel Co. v. Cummings*, 296 U. S. 74, 79; *Garvan v. \$20,000 Bonds*, 265 Fed. 477, 479.

Essentially, this case is like *Singer* and *Mellie Iran*. In the latter, the Custodian vested the residue of the assets of the New York agency of the Yokohama Specie Bank, in liquidation, remaining after satisfaction of the claims allowed in the liquidation proceeding. The claims of *Singer* and *Banque Mellie Iran*, sustained by this Court, will necessarily diminish, *pro tanto*, the residue which the Custodian will take. Recognition of petitioner's attachment lien in this case would affect the Custodian in precisely the same way.

Since the Custodian's power to vest is not in issue here, there is no parallel between this case and *Propper v. Clark*.

The court below failed to observe that, in the *Propper* case, (a) this Court carefully premised its "determination on the purpose of Congress to prevent shifts in title to blocked assets," 337 U. S. 472, 486 and (b) this Court expressly refused to decide "whether every determination of rights concerning blocked property in unlicensed litigation is voidable." 337 U. S. 472, 486. The court below overlooked the fact that this Court very carefully limited

its holding to the particular facts of the *Propper* case and reserved for future decision, the impact of the freezing controls in other cases. The rule for other cases has now been made in *Singer* and *Mellie Iran*. By these cases this Court has decided that the freezing controls permit a valid "determination of rights concerning blocked property" even though both the litigation and the transaction underlying it have not been authorized by federal authority so long as the adjudication is not consummated by a change of title. In the instant case, not only is title to the attached funds unchanged by the judgment but it is conceded that petitioner's attachment was authorized. For this reason, the instant case—even more than *Singer* and *Mellie Iran*—falls beyond the range of the *Propper* case.

III.

The District Court Should Have Refused to Entertain This Cause.

Six years before this proceeding was begun the state court, by an *in rem* judgment had adjudicated the rights of petitioner and the German banks—through whom respondent claims—in the attached accounts. The adjudication necessarily decided, as between petitioner and the German banks, that the bank accounts were attachable. *Ackerman v. Tobin*, 8th Cir. 1927, 22 F. 2d 541, cert. den. 276 U. S. 628; *Clark v. Williard*, 294 U. S. 211, 213.

The state court adjudication, being *in rem*, is binding in respect to the attached property, not only on respondent, who is in privity with the German banks, but upon the world as well. *In rem* judgments are not open to review in collateral proceedings. Restatement of the law, *Judgments* § 34, g; *Green v. Van Buskirk*, 74 U. S. 139, 149; *Schoenholz v. N. Y. Life Ins. Co.*, 192 N. Y. App. Div. 563; *Becher v. Cantoure Laboratories, Inc.*, 279 U. S. 388.

In such circumstances, the District Court should have refused to decree the invalidity of the state court's seizure of the attached funds and its judgment which, under *Penny v. Neff*, 95 U. S. 714, derived validity solely from that seizure. Such, under the law, is the measure of deference owed, as a matter of comity, between state and federal courts in contests over a *res* and, as a matter of right, under the full faith and credit clause of the Federal Constitution.

A.

The judgment below is an unlawful collateral attack on the state court judgment.

It is settled that the judgment of a court having jurisdiction, even if erroneous, may not be attacked in a collateral proceeding. Any errors leading to the judgment must be corrected by the court which rendered the judgment or by appeal therefrom. The rule applies to judgments *in rem*, based on attachment, as well as those *in personam*. *Cooper v. Reynolds*, 77 U. S. 308, 319; *Mellen v. Moline Iron Works*, 131 U. S. 352, 367; *Denman v. McGuire*, 101 161; *Van Camp v. Searle*, 147 N. Y. 150.

It is clear that petitioner's judgment against the German banks bound the attached bank accounts. Whether rightly or erroneously, the bank accounts were seized and in the custody of the court. N. Y. Civ. Prac. Act, § 916(3). Respondent tacitly recognized this fact, when he disavowed all right to money judgment against the Chase Bank so long as the attachment levy stood. Here—in contrast to his method in *Propper v. Clark*—he chose merely to seek an adjudication that the state court judgment was invalid. His position is, in essence, that although the state court seized the bank accounts, it should not have done so.

Such an attack challenges—not the power of the state court to deal with the attached funds but—the propriety of its having done so. *Grant v. Leach & Co.*, 280 U. S. 351, 359; *Chandler v. Peketz*, 297 U. S. 609.

Of such an attack the Supreme Court, speaking through Brandeis, J., said in *Lion Bonding & S. Co. v. Karatz*, 262 U. S. 77, 90:

" * * * But if the legality of the state court's action was to be questioned, it could be done only by laying the proper foundation through appropriate proceedings in that court. * * * If such action had been taken and relief had been denied there, resort could then have been had to appellate proceedings. *Wiswall v. Sampson*, 14 How. 52, 14 L. ed. 322. But the judgment of the state court, which had possession of the *res*, could not be set aside by a collateral attack in the federal courts; *Mutual Reserve Fund Life Assn. v. Phelps*, 190 U. S. 147, 159, 160, 47 L. ed. 987, 995, 23 Sup. Ct. Rep. 707. Nor could it be ignored. *Shields v. Coleman*, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570. Lower federal courts are not superior to state courts."

The judgment of the state court in petitioner's attachment action was binding until set aside in a direct proceeding. The power of the District Court was coordinate with—not superior to—that of the state court. Under the *Karatz* case it was bound to respect the judgment of the state court, not review it. This obligation follows from judicial precedent. *McLain v. Lance*, 5th Cir., 1944, 146 F. 2d 341, 345; *Leadville Coal Co. v. McCreery*, 141 U. S. 475, 477; *Nougue v. Clapp*, 101 U. S. 551; *Peck v. Jenness*, 7 How. (U. S.) 612, 624-626.

It follows, too, from the solemn injunction of the full faith and credit clause of the Federal Constitution. U. S. Constitution, Art. IV, Sec. 1; 28 U. S. Code, § 687; *American Surety Co. v. Baldwin*, 287 U. S. 156, 166; *Milwaukee County v. White Co.*, 296 U. S. 268; *Sanders v. Armour Fertilizer Works*, 292 U. S. 190; *Green v. Van Buskirk*, 74 U. S. 139; *Steingut v. National City Bank*, 38 F. Supp. 451; *Ackerman v. Tobin*, 8th Cir., 1927, 22 F. 2d 541; *Loewe v. Savings Bank of Danbury*, 2nd Cir., 1916, 236 F. 444, 448.

Since the German banks could not collaterally attack the state court's judgment, it was not open to respondent—their privy—to do so. *Mitchell v. First Nat. Bank*, 180 U. S. 471, 481; *Bigelow v. Old Dominion Copper Min. & S. Co.*, 225 U. S. 111, 129.

B.

The judgment below interferes with the state court's custody and control of the attached debts in violation of the traditional rule of comity between state and federal courts.

For almost a hundred years it has been the settled rule of comity that, "when a state court and a court of the United States may each take jurisdiction of a matter [involving a *res*], the tribunal whose jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed, and the jurisdiction involved is exhausted." *Kline v. Burke Construction Co.*, 260 U. S. 226, 231; *Freeman v. Howe*, 24 How. 450. The rule is one of right. It arises from the necessity, in a federal system such as ours, of avoiding unseemly conflicts between our independent state and federal tribunals. The Supreme Court has acknowledged a "long recognized duty . . . to give effect to such 'methods of procedure as shall serve to conciliate the distinct and independent tribunals of the states and of the Union, so that they may cooperate as harmonious members of a judicial system coextensive with the United States'." *U. S. v. Bank of New York & Trust Co.*, 296 U. S. 463, 477.

The rule binds the Government even when pursuing a federal right. *U. S. v. Bank of New York & Trust Co.*, 296 U. S. 463, 479.

The state court was the first to take jurisdiction. The Sheriff, in levying petitioner's attachment, acted as an officer of the state. *Stojowski v. Banque de France*, 294 N. Y. 134, 135. By his levy, the state "seized" the attached debts.²¹ *N. Y. Civ. Prac. Act*, §916 (3). The debts were then impressed with a lien to secure petitioner's recovery.

²¹ The seizure was constructive since intangibles are not capable of manual seizure. In law, such a seizure is the equivalent of a manual seizure. *Comm. for Polish Relief v. Banca Nationala a Rumaniei*, 262 App. Div. 543, aff'd 288 N. Y. 332; *Security Savings Bank v. California*, 263 U. S. 282, 286; *Harris v. Balk*, 198 U. S. 215, 222, 223.

(See cases cited, *supra*, p. 51, footnote 17). The Chase Bank was bound by the seizure and lien. The statutory injunction forbade it "to make or suffer, any transfer or other disposition of, or interfere with . . . or pay over or otherwise dispose of any debt so levied upon . . . to any person, or persons, other than the sheriff serving" the warrant "except upon direction of the sheriff or pursuant to an order of the court". N. Y. *Civ. Prac. Act*, § 917 (2). Disobedience by the Chase Bank would have meant fine and imprisonment as for a contempt. N. Y. *Judiciary Law*, §§ 750(3), 753(3), (8). And the sheriff was empowered to sue to compel payment of the debt to him. N. Y. *Civ. Prac. Act*, § 922.

By this constructive seizure, the state court took exclusive custody and control of the attached debts. *U. S. of Mexico v. Schmuck*, 294 N. Y. 265, 268; *Cooper v. Reynolds*, 10 Wall, 308, 316, 317; *Beardsley v. Ingraham*, 183 N. Y. 411, 420. Exclusive jurisdiction over the *res* so obtained continues in the state court "until its duty is fully performed, and the jurisdiction involved is exhausted." *Kline v. Burke Construction Co.*, 260 U. S. 226, 231. Here this event would occur only when petitioner's judgment was satisfied out of the attached funds. N. Y. *Civ. Prac. Act*, §§ 645, 520; *U. S. of Mexico v. Schmuck*, 294 N. Y. 265, 268.

With the attached debts so firmly lodged in the custody of the state court, it is clear that respondent could not have sued in the District Court for a money judgment. *U. S. v. Bank of New York & Trust Co.*, 296 U. S. 463. Respondent must have been cognizant of this bar when he chose to sue here for declaratory relief only. Did this choice of remedy reconcile the proceeding with the traditional rule of comity between state and federal courts? We believe not.

Respondent's position, as stated in his brief in the District Court, was that "only a declaration of rights" was sought. No order was asked "directing that the funds be surrendered to him." He admitted, however, that the declaration sought "will interfere with the possession of

the state court * * * to the extent that in later appropriate proceedings the state court will be bound to recognize the rights adjudicated here." This is to say that, by reason of the District Court's decree, the state court must void its custody and surrender the *res*. It is precisely this—an adjudication of the state court's title—which the rule of comity was designed to prevent. *Ex parte Baldwin*, 291 U. S. 610, 616; *Lion Bonding & S. Co. v. Karatz*, 262 U. S. 77, 89; *Peck v. Jenness*, 7 How. (U. S.) 612, 624-626.

The issue tends to be obscured here because the seizures were symbolic.²² Petitioner's seizure rests upon the declaration of the statute, fortified by injunction. *N. Y. Civ. Prac. Act*, §§ 916(3), 917(2). Respondent's seizure rests upon his declaration, i.e., his vesting order and demand. Since both seizures rest upon declarations, they can be rescinded by declarations. The District Court has done precisely this. Disregarding the State Court's injunction, it has rescinded the State Court's seizure by declaring that none occurred, leaving respondent's seizure fully effective. That we are dealing here with symbolisms, should not obscure the fact that the District Court, by nullifying petitioner's attachment, has, in practical effect, laid its hand upon the property in dispute. It is this which the rule of comity forbids.

Markham v. Allen, 326 U. S. 490, does not hold otherwise. There, only rights *in personam* were involved. The Custodian did not—as here—attack the decree of probate or the right of the State Court to administer the estate. He recognized the validity of the State Court judgment and merely asked that he be permitted to take the fruits of it.

²² The Custodian's vesting order and demand were an *ex parte* seizure of the bank accounts in question. *Great Northern Ry. Co. v. Sutherland*, 273 U. S. 182, 191; *Commercial Trust Co. v. Miller*, 262 U. S. 51, 55. His application to the District Court was merely in aid of "the seizure which he effected at the time of his demand." *Miller v. Kalinwerke, etc.*, 2nd Cir., 283 F. 746, 752.

Petitioner's attachment was also an *in rem* seizure. *Pennoyer v. Neff*, 95 U. S. 714, 727; *N. Y. Civ. Prac. Act*, § 916(3).

This distinction is decisive. *U. S. v. Klein*, 303 U. S. 276, 282. *Markham v. Allen* would parallel the instant case only if in *Markham* the Custodian had premised his claim upon the invalidity of the executor's title or the nullity of the State Court's probate decree.

The vice of the decree below is not cured merely because the decree is declaratory and does not direct the Chase Bank to pay the attached debts to respondent. If the decree stands, *res adjudicata* will leave the state court no choice, as respondent himself notes, except to surrender custody of the attached debts so that they may be paid to respondent. The overtones of a plea of *res adjudicata* may seem gentler than the harsh directive of an order to pay. In actuality, the compulsion of the one is equally as forceful, ultimately, as that of the other. Whichever means is employed the end is the same—the state court is forced to surrender its jurisdiction. Neither method concedes to that court the respect which the rule of comity requires.

Since the State Court was the first to take jurisdiction here, the District Court, in obedience to the rule of comity, should have remitted the Custodian to that forum. The State Courts have shown themselves fully competent—and indeed, eager—to accord the Custodian every right to which he is entitled. *Matter of Viscomi*, 270 N. Y. App. Div. 732; *Stern v. Newton*, 180 N. Y. Misc. 241. Therefore, the breach of comity here cannot be excused by any plea of necessity.

C.

Declaratory relief should have been denied because respondent had an adequate and summary remedy in the prior state court proceeding.

For some unstated reason, respondent chose to test the validity of petitioner's attachment in the District Court. Ever since the warrant was levied, the state court has been—and still is—open to a summary application by respondent to test the validity of petitioner's attachment. N. Y.

Civ. Prac. Act, § 948. Had respondent chosen so to act he could have obtained in one stroke, if so entitled, an adjudication of his title and a surrender by the state court of its custody of the attached accounts. On such an application, the state court, equally with the District Court, would have been bound to enforce the Federal law. *U. S. v. Bank of New York & Trust Co.*, 296 U. S. 463, 479.

As matters stand, respondent, as he admits, must even now apply to the state court to surrender its custody in order to enforce the rights decreed below. Upon such an application, the state court may well inquire whether, under the full faith and credit clause of the Constitution, it is bound to recognize the judgment of the District Court as against its own. *Peck v. Jenness*, 7 How. (U. S.) 612, 624-626; *Leadville Coal Co. v. McCreery*, 141 U. S. 475-477; *Nougue v. Clapp*, 101 U. S. 551.

By choosing two proceedings to accomplish that which might have been done on one application to the state court, respondent has multiplied the litigation. Even more, he has needlessly pitted the District Court against the state court. The District Court should have refused to entertain this cause. *Brillhart v. Excess Ins. Co.*, 316 U. S. 491; *Carbide & Carbon C. Corp. v. U. S. I. Chemicals*, 4th Cir. 1944, 140 F. 2d 47; *McLain v. Lance*, 5th Cir. 1944, 146 F. 2d 341.

CONCLUSION

It is respectfully urged that certiorari be granted.

Respectfully submitted,

JOSEPH M. COHEN,
Attorney for Petitioner, Zittman.

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Supreme Court of the United States

OCTOBER TERM, 1950

**RO ZITTMAN (with whom The Chase National Bank of the
City of New York was impleaded below),**

Petitioner,

against

**J. HOWARD McGRATH, Attorney General, as Successor to
the Alien Property Custodian,**

Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR PETITIONER, ZITTMAN

JOSEPH M. COHEN,
Attorney for Petitioner,
36 West 44th Street,
New York 18, N. Y.

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ARGUMENT

- I. By issuing right, title and interest vesting orders, respondent intentionally limited his seizure to the residual interest in the attached bank accounts remaining in the German banks after giving effect to petitioner's attachment. By issuing such limited vesting orders, respondent chose to forego his right to preliminary custody of the whole of the attached accounts and to take only the residual interest of the German banks, as determined by the Court 14
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(1) Petitioner's attachment—in contrast to the receivership order in the *Propper* case—involved no claim of title. It created only the attachment lien required for *in rem* jurisdiction. _____

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(2) Only the rights of the German banks—not the Custodian's vesting power—is in issue here _____

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III. General Ruling No. 12, issued April 21, 1942, cannot be employed to defeat petitioner's attachment because the Ruling (a) does not have retroactive force and (b) if properly construed, permits a valid attachment of frozen funds. _____

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A. General Ruling No. 12 cannot operate retroactively. _____

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B. Properly construed, General Ruling No. 12 authorized a valid attachment of frozen funds _____

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IV. The District Court should have refused to entertain this cause. _____

39

A. The judgment below is an unlawful collateral attack on the state court judgment. _____

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B. The judgment below interferes with the state court's custody and control of the attached debts in violation of the traditional rule of comity between state and federal courts. _____

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C. Declaratory relief should have been denied because respondent had an adequate and summary remedy in the prior state court proceeding. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

LEO ZITTMAN (with whom The Chase National Bank of the
City of New York was impleaded below),

Petitioner,

against

J. HOWARD McGRATH, Attorney General, as Successor to
the Alien Property Custodian,¹

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER, ZITTMAN

This case is a companion to the case, also here on certiorari, entitled "Leo Zittman (with whom the Federal Reserve Bank of New York was impleaded below), petitioner, against J. Howard McGrath, Attorney General, as Successor to the Alien Property Custodian, respondent,"

¹ J. Howard McGrath was substituted in the Court of Appeals for Tom C. Clark, as Attorney General. The terms "Custodian" and "respondent" are used interchangeably to refer either to the Alien Property Custodian or to the Attorney General who succeeded to the Custodian's powers and duties. Exec. Order No. 9788, 1 C.F.R. 1946 Supp. 169.

No. 299. For convenience, the latter case will be referred to as the "Federal Reserve case".²

Opinions Below

The *per curiam* opinion of the Court of Appeals for the Second Circuit is reported at 182 F. 2d 349 (R. 150). The opinion of the District Court for the Southern District of New York is reported at 82 F. Supp. 740 (R. 71).³

Jurisdiction

The judgment below was rendered June 2, 1950 (R. 151). Petition for rehearing was filed June 15, 1950, and denied on June 27, 1950 (R. 153). Jurisdiction of this Court is invoked under Title 28 of the U. S. Code, § 1254, writ of certiorari having been granted on November 13, 1950 (R. 155).

² The instant case and the Federal Reserve case were brought by respondent to test the force of a New York state court attachment levied, in a single action brought by petitioner, upon certain blocked bank accounts maintained by two German banks with the Chase National Bank of the City of New York and the Federal Reserve Bank of New York. Though there was but one action in the state court, respondent filed two separate proceedings in the District Court. One was directed to the attached accounts maintained with the Chase Bank. The other was directed to the attached accounts maintained with the Federal Reserve Bank. Each bank was a party to only that proceeding in the District Court which involved the particular accounts maintained with it. Though the two cases were heard on separate records and briefs and resulted in separate judgments below, they were dealt with by a single opinion both in the District Court and in the Court of Appeals. Neither bank appealed the judgment of the District Court. The instant case was brought to test the validity of the attachment. The Federal Reserve case was brought to test the Custodian's right to possession of the attached accounts, irrespective of the validity of the attachment. The courts below treated the cases as involving the same issues.

³ The record in the instant case and in the Federal Reserve case have been bound together. Record references are to pages of combined record except where indicated otherwise.

Statutes Involved

1. The Congressional Joint Resolution of May 7, 1940, amending § 5(b) of the Trading with the Enemy Act and the relevant portions of Executive Order 8389, as amended, issued pursuant thereto. Appendix, pp. 47-48.
2. The New York Civil Practice Act, the relevant portions of which appear in Appendix, *infra*, pp. 50-54.
3. The New York Judiciary Law, the relevant portions of which appear in Appendix, *infra*, pp. 49-50.

Nature of the Proceedings

This case presents for determination the rights acquired by an American citizen by reason of a pre-war suit brought by him in a New York state court against two German banks.⁴ Petitioner, unable to obtain personal service of process upon the non-resident German banks (R. 50), sued them in the state court by attaching certain bank accounts maintained by the German banks with the Chase National Bank of New York City (hereinafter called "Chase Bank"). These bank accounts were then blocked under the freezing controls of Executive Order 8389 (5 F. R. 1400). Petitioner attached on December 11, 1941, and took judgment on March 27, 1942.

In October, 1946, almost five years after the attachment, respondent vested the right, title and interest of the German banks in the attached bank accounts. Some sixteen months later, respondent asserting, in effect, that the attachment was void as against the German banks—whose rights he was seeking to enforce—because the funds levied upon had been blocked by the freezing controls of Executive Order 8389, petitioned the District Court for the Southern

⁴ The Reichsbank and the Deutsche Golddiskontbank, herein called the "German banks".

District of New York for a declaratory judgment decreeing, in effect, that, because of the freezing controls, petitioner's attachment was void and that the German banks—and respondent as their successor—were entitled to the attached funds.

The District Court granted the relief sought by petitioner and the Court of Appeals for the Second Circuit has affirmed.

Statement of the Case

The material facts are undisputed (R. 71).

On December 11, 1941, before war was declared against Germany, petitioner Zittman, a resident citizen of the United States, sued in the Supreme Court of the State of New York for Kings County on a claim against the two German banks (R. 48). The cause of action sued on arose in July, 1937 (R. 49)—some three years before the freezing controls were promulgated.

Both German banks were foreign corporations with offices in Germany; neither was amenable to personal service (R. 50). Petitioner, being unable to sue *in personam*, proceeded by attachment. On December 11, 1941, the state court issued a warrant of attachment to the Sheriff. The Sheriff levied upon the blocked accounts maintained by the two German banks with the Chase Bank by serving a certified copy of the warrant on the Chase Bank on December 11, 1941, at 2:41 P. M., E. S. T. (R. 49, 67).⁵ Service of the warrant effected a seizure of all of the rights of the

⁵ Petitioner attached on December 11, 1941, at 2:41 P. M., E. S. T.—before war with Germany began on December 11, 1941, at 3:05 P. M., E. S. T. (55 Stat. 796). On the same day, at 2:20 P. M., E. S. T., the Sheriff made like service on the Federal Reserve Bank of New York (R. 126-7, 136, 103). The Federal Reserve levy attached certain accounts of the Reichsbank only. Apparently, the Federal Reserve held no credits or property for the Golddiskontbank. The attachment in the case of the Federal Reserve was made the subject of a separate petition below. The judgment on this latter petition is also here on certiorari in a companion case, No. 299.

German banks in the attached accounts (N. Y. *Civil Practice Act*, § 916[3]).

In response to the warrant, the Chase Bank certified to the Sheriff those credits, totalling \$57,005.33, and securities which it held for the German banks and reported that the same were held by it "subject to Executive Order No. 8389, as amended" (R. 59). The attached property continues to this day to be blocked under the federal freezing controls.

Although frozen, the bank accounts were attachable. This is clear from the formal stipulation of fact in this case which states the following (R. 65-66):

"5. From the inception of 'freezing' controls, all litigants who, prior to commencing attachment actions against funds belonging to blocked nationals, had requested the Secretary of the Treasury to license an attachment, or levy, received from the Treasury Department a response of the following nature:

"Under Executive Order No. 8389, as amended, and the Regulations issued thereunder, no attempt is made to limit the bringing of suits in the courts of the United States or of any of the States. However, should you secure a judgment against one of the parties referred to in your letter, which is a country covered by the order, or a national thereof, a license would have to be secured before payment could be made from accounts in banking institutions within the United States in the name of such country or national.

"6. From the inception of 'freezing' controls, the Secretary of the Treasury in administering the 'freezing' control program adopted the position, in response to numerous requests made of him, that the bringing of an action, the issuance of a warrant of attachment therein, and the levy thereunder upon blocked property found within the jurisdiction of the court which issued the warrant were not forbidden but that a license was required to be secured before payment could be made from the blocked account to satisfy any judgment recovered in such action.

"7. * * * A license to institute the action and levy the attachment was in fact not required by the Treasury Department."

It is not denied that these rulings of the Secretary of the Treasury are binding upon respondent. At all of the times material here, the Treasury administered the freezing controls under a delegation of power by the President (Exec. Order 8389, § 7).

The provisional jurisdiction acquired by the state court attachment was perfected. As required by state law, summons was regularly served on the two German banks by publication and copies of the summons, complaint and other requisite documents were regularly mailed to the Attorney General of the United States on behalf of the two German banks. Respondent acknowledged receipt of the mailing (R. 50, 64-65).

Neither of the German banks nor the U. S. Attorney General appeared in the state court action or took any steps therein. On March 27, 1942, petitioner took judgment in the state court action against the German banks for a total of \$146,724.40 and costs (R. 50).

Respondent concedes that the state court attachment proceeding was regularly begun and reduced to judgment.

No execution has issued to enforce petitioner's judgment out of the attached blocked property (R. 5). It is agreed by all parties that execution cannot issue until a federal license is granted, under the freezing controls, authorizing application of the blocked funds to payment of the judgment. Pending application for, and issuance of, such a license, petitioner has, from time to time, applied for and secured orders of the state court extending the time within which the Sheriff might sue to reduce the attached funds and property to his possession. These orders have been duly and regularly served on the Chase Bank (R. 51, 27). By reason of the service of these orders, the funds and securities continue under attachment (N. Y. *Civil Practice Act*, § 922). The attachment has never been

vacated, released, discharged or otherwise annulled (R. 52, 27).

Almost five years after petitioner attached, the Alien Property Custodian executed two limited vesting orders affecting the attached accounts.

One, Vesting Order No. 7792, was executed October 3, 1946, and purported to vest the *right, title and interest* of the Reichsbank in its account with the Chase Bank (R. 9-11). The other, Vesting Order No. 7870, was executed October 14, 1946, and purported to vest the *right, title and interest* of the Golddiskontbank in its accounts with the Chase Bank (R. 14-15).⁶

These vesting orders necessitated a judicial determination of the *quantum* of interest remaining in the German banks after the attachment, for it is conceded that only this residual interest was vested by respondent.⁷ To secure this determination, respondent instituted the present summary proceeding against petitioner, joining the Chase Bank and the Sheriff.⁸

The District Court, upon the authority of *Clark v. Propper*, 169 F. 2d 324, held that the attachment was void as to the German banks and, in effect, that they were entitled to the whole of the attached accounts. It awarded a declaratory judgment to respondent, who claimed only the interest of the German banks under his limited vesting orders (R. 76-78). The Court of Appeals affirmed solely on the authority of *Propper v. Clark*, 337 U. S. 472. Certiorari was granted by this Court on November 13, 1950 (R. 155).

⁶ The District Court adjudged the orders to be "right, title and interest" vesting orders (R. 77).

⁷ The limited force of a "right, title and interest" vesting order is discussed hereafter. Brief, *infra*, pp. 14-17.

⁸ The proceeding was heard summarily on respondent's petition and the answers thereto, as supplemented by a stipulation of facts (R. 64-70).

Specification of Errors

The Court below erred:

1. In holding that the pre-war attachment by petitioner—an American citizen—of the blocked funds of the German banks for jurisdictional purposes, in aid of petitioner's action against the non-resident German banks is void, notwithstanding respondent's concession in this case (R. 65-66) that, under Presidential Executive Order No. 8389, "the bringing of an action, the issuance of a warrant of attachment therein, and the levy thereunder upon blocked property found within the jurisdiction of the court which issued the warrant were not forbidden" by the freezing controls "but that a license was required to be secured before payment could be made from the blocked account to satisfy any judgment recovered in such action".

2. In refusing to hold that this case is controlled by *Lyon v. Singer* and *Lyon v. Banque Mellie Iran*, 339 U. S. 841, and in holding, instead, that this case is controlled by *Propper v. Clark*, 337 U. S. 472.

3. In refusing to hold that the District Court should not have entertained this cause because,

(a) this proceeding was an unwarranted collateral attack on petitioner's state court judgment, in violation of the full faith and credit clause of the Federal Constitution;

(b) this proceeding precipitated a conflict of jurisdiction over a res in violation of the settled rule of comity between state and federal courts; and

(c) a full and adequate summary remedy was available to respondent in the state court.

4. In refusing to reverse the judgment of the District Court.

Summary of Argument

I. Here the Custodian vested by a *right, title and interest* vesting order. Such a vesting raises issues totally different from those raised by a *res* vesting.

A *res* vesting order entitles the Custodian to summary custody of the vested property subject to the rights of non-enemies who may have interests in, or claims against it. The Custodian takes the property subject to such interests and claims as they are determined in a later suit under Sec. 9 of the Trading with the Enemy Act. The Custodian issues a *res* order when he elects to take summary custody of the property and to relegate adjudication of adverse rights to a later suit under Sec. 9.

A *right, title and interest* vesting order entitles the Custodian to only such interest as the enemy may have in the vested property. Such a vesting order is effective only after the Court, in a proceeding such as this, has determined the extent of the enemy interest and has awarded that interest to the Custodian. The Custodian issues a *right, title and interest* vesting order when he elects to have a judicial determination of adverse interests in the property before he takes it into his custody.

Whichever order issues, the Custodian must, under the Fifth Amendment, respect the rights of non-enemies in the vested property.

It is agreed that *right, title and interest* orders were issued here. Therefore, to succeed here respondent must establish that petitioner's attachment was void as against the German banks whose interests, alone, he claims.

II. Petitioner's attachment is valid.

4. The freezing controls in force when petitioner attached were those authorized by the Congressional Joint Resolution of May 7, 1940, which amended Sec. 5(b) of the Trading with the Enemy Act. These were peacetime controls authorizing the Executive to screen dealings in

frozen property in order to protect it against Axis conquest. (In 1933, Sec. 5(b) had been made applicable in peacetime national emergencies as well as in wartime.)

The controls of Sec. 5(b) did not, even in time of war, proscribe suits against frozen property. Both at common law and under the Trading with the Enemy Act it is settled that, in wartime, a citizen may sue and attach the property of the enemy. Nothing in the purpose or context of the controls suggests a different rule for peacetime application.

As construed below, the controls immunize frozen Axis property from suits by citizens. This defeats the purpose of the controls; it distorts them from a check upon the Axis to a check upon American citizens.

The Secretary of the Treasury, in administering the controls, ruled specifically that frozen property was subject to suits by citizens.

B. Regardless of whether the Secretary had the power to proscribe attachments, he made it clear that they were beyond the ambit of the controls. He ruled specifically that the controls did not limit suits and that no license was needed to attach. As *amicus* in the *Polish Relief* case, the Secretary advised the New York State Court of Appeals that he had authorized attachment of frozen funds. He urged the New York courts to take jurisdiction of attachments without a license.

The New York courts have adhered closely to the Treasury's ruling. They entertain litigation against frozen funds, including attachments, but, as required by the Treasury, withhold payment of the judgment until the execution is federally licensed. This procedure was approved by this Court recently in *Lyon v. Singer*. Since petitioner's attachment and judgment were obtained in this approved manner, they should have been upheld below.

Respondent insists that, although the Treasury gave authority to attach, the attachment must be regarded as

void when levied but validated *ab initio*, when a post-judgment license issues permitting execution on the judgment. Nothing in the Secretary's ruling, stipulated to here, affords any basis for so limiting the force of the authority given by the Secretary. Moreover, if so limited, the ruling would be an attempt to authorize as valid an attachment forbidden by the Constitution. Under the Fourteenth Amendment, as construed in *Pennoyer v. Neff*, an attachment, to be valid, must reach the property levied upon before judgment. Its validity or force cannot be made to depend upon whether or not a post-judgment Treasury license will ultimately issue. The Treasury must be taken to have authorized a valid attachment—not one void under the Constitution.

The Treasury and respondent have licensed payment of numerous judgments resting on attachments of frozen funds. Under *Pennoyer v. Neff*, these judgments were void if, as respondent asserts, the attachments did not, prior to judgment, reach the frozen property levied upon. Under respondent's view, he and the Secretary have exposed the Sheriff and the garnishee banks to a huge double liability for having paid void judgments, on the authority of Treasury licenses.

C. In *Lyon v. Singer*, this Court affirmed the holding of the New York State Court of Appeals that an unlicensed suit, based upon an unlicensed post-freezing transaction, resulted in a judgment which created valid rights *in rem* against frozen funds (previously vested by the Custodian) but that execution upon the judgment must await federal license. Under *Lyon v. Singer*, the instant case is *a fortiori* because petitioner's attachment was authorized and levied on a cause of action which pre-dated freezing.

The court below misplaced its reliance on *Propper v. Clark*. *Lyon v. Singer* limited *Propper* to the case of a claim of title to frozen funds asserted against the Custodian's paramount power to vest. The instant case differs from *Propper* in both aspects. Thus, (a) peti-

tioner's attachment effected a lien—not a shift of title; and (b) since the Custodian vested only the right, title and interest of the German banks in the attached accounts, he chose not to put in issue his paramount power to vest. The *Singer* case—not *Propper*—applies here.

III. Below respondent rested his case on Gen. Ruling 12, issued April 21, 1942, more than four months after petitioner attached. He would apply this Ruling retroactively to petitioner's attachment. He argued that Gen. Ruling 12, if so applied, would permit attachment of frozen funds and, at the same time, insulate the funds from every consequence of an attachment until execution on the ensuing judgment were licensed.

A. Gen. Ruling 12 has severe criminal sanctions. Therefore, the Constitution forbids its application retroactively to void petitioner's attachment. Since this Court held in the *Propper* case that Gen. Ruling 12 does not operate retrospectively, it has no application to this case.

B. Even if applicable, Gen. Ruling 12 would confirm—not deny—the validity of petitioner's attachment. Subd. 3 of the Ruling states that a transfer (defined to include attachments) is valid if at any time authorized by the Treasury. It is agreed here that petitioner's attachment was so authorized. Therefore, its validity is confirmed by subd. 3.

Even subd. 4 of the General Ruling—on which respondent relies—validates an attachment for the purpose of a judgment determining the rights and liabilities of the litigating parties. Such a judgment necessarily adjudicates the validity of the attachment. Therefore, under subd. 4, petitioner's state court judgment is a holding that his attachment is valid, which binds the German banks and respondent as their privy.

If, as respondent asserts, subd. 4 purports to authorize an attachment and, at the same time, to insulate the property levied upon from the consequences of the attachment,

it is void under the Fifth Amendment as being too contradictory to be intelligible and under *Pennoyer v. Neff* as authorizing an attachment procedure forbidden by the Fourteenth Amendment. Subd. 4 should be construed so as to make it valid, not offensive to the Constitution.

IV. The District Court should have remitted respondent to the state court.

A. The state court, by the attachment, had taken exclusive prior custody of the attached bank accounts and, by its judgment, held them to be attachable. The adjudication bound the German banks and respondent as their privy. The judgment below voids the state court judgment and so is an unlawful collateral attack on that judgment, in violation of the full faith and credit clause of the Constitution.

B. Under the rule of comity between state and federal courts in contests over a *res*, the state court's prior jurisdiction over the attached accounts was exclusive. Therefore, respondent should have sought his remedy in the state court, since the rule of comity applies even when the U. S. is the suitor. The rule of comity, enforced by this Court for almost a century, is denuded of meaning if, as here, the state court's prior custody of the *res* may be destroyed and its injunction protecting that custody may be ignored.

C. Respondent admits that, despite the judgment below, he must still ask the state court to release its attachment and injunction and deliver the funds to him. Thus, two proceedings are required to do what might have been done on one application if the respondent had petitioned the state court in the first instance. Since the declaratory relief granted below was unnecessary and multiplies the litigation, it should have been denied.

ARGUMENT

I

By issuing right, title and interest vesting orders, respondent intentionally limited his seizure to the residual interest in the attached bank accounts, remaining in the German banks after giving effect to petitioner's attachment. By issuing such limited vesting orders, respondent chose to forego his right to preliminary custody of the whole of the attached accounts and to take only the residual interest of the German banks, as determined by the Court.

The Custodian's vesting orders are of two kinds. One—the so-called *res* vesting order—is a seizure of designated property. The other—the *right, title and interest* vesting order—seizes merely the enemy's interest in designated property.⁹

A *res* vesting order is a preliminary seizure. The Custodian takes the property regardless of—but without prejudice to—the rights of others who have claims against it. The Custodian must respect the rights of others to the property as determined by a later suit under Sec. 9 of the Trading with the Enemy Act. *Central Union Trust Co. v. Garvan*, 254 U. S. 554, 569; *Stoehr v. Wallace*, 255 U. S. 239, 245-246.

⁹ "Vesting action by the Custodian may take two forms. He may vest the 'right, title and interest' of an enemy in and to property or he may issue a *res* vesting order by which he vests the asset itself. In *Stern v. Newton*, 39 N. Y. S. 2d 593, 598 (1943), the difference between the two orders was expressed in this fashion: 'Where the Custodian seizes only the right, title and interest of an enemy national, a question is presented as to the extent of that interest. * * * But where the Custodian vests the particular property, as distinguished from the interest of the enemy national in the property, he takes the entire right, title and interest therein, regardless of the quantum owned by the enemy national.' Robert M. Vote, Estates and Trust Branch Office of Alien Property (1949), *Alien Property Litigation in World War II*, p. A-3.

By a *right, title and interest* vesting order, the Custodian merely takes the interest of the enemy in the designated property. Such an order is effective only if, and to the extent that, the enemy has an interest in the property. The enemy's interest delimits the Custodian's rights. The vesting order does not contract or enlarge that interest. If the enemy's interest is disputed, as here, the dispute must be resolved by the Court before the vesting order can take effect. *Kahn v. Garvan*, 263 Fed. 909, 912; *Miller v. Rouse*, 276 Fed. 715, 716; *U. S. v. The Antoinetta*, 153 F. 2d 138, 143; *Isenberg v. Trent Trust Co.*, 26 F. 2d 609, 613, aff'd on rehearing 31 F. 2d 553, cert. den. 279 U. S. 862; *Mayer v. Garvan*, 279 Fed. 229, 239; *In re People by Beha, Supt. of Ins.*, 256 N. Y. 177, 187, cert. den. 284 U. S. 633; *U. S. v. The San Leonardo*, 51 F. Supp. 107, 109; *The Pietro Campanella*, 47 F. Supp. 374, 377, 380; *Clark v. Edmunds*, 73 F. Supp. 390, 392-394; *Chase Nat. Bank v. Reinicke*, 76 N. Y. S. 2d 63, 65.

It is discretionary with the Custodian whether to vest enemy property. *Clark v. Allen*, 331 U. S. 503, 511. If he elects to vest, he chooses which type of vesting order shall issue. He issues a *right, title and interest* vesting order, if he elects to have a judicial determination of adverse interests in the property before it is taken into his custody. He issues a *res* vesting order, if he elects to take immediate custody of the property and to relegate the adjudication of adverse rights to a later suit under Section 9 of the Trading with the Enemy Act. *Kahn v. Garvan*, 263 F. 909, 912; *Stern v. Newton*, 180 N. Y. Misc. 241, 39 N. Y. S. 2d 593, 598.

Whichever course the Custodian pursues, he must respect the rights of non-enemies in the vested property. The vesting power—whether exerted through a *res* or a *right, title and interest* order—is limited by the Fifth Amendment. The latter permits nothing less. *Müller v. Kaliwerke*, 283 Fed. 746, 757-758; *Commercial T. Co. v. Miller*, 231 Fed. 804, 806, aff'd 262 U. S. 51; *Becker Steel Co. v. Cummings*, 296 U. S. 74, 79; *Garvan v. \$20,000 Bonds*, 265 Fed. 477, 479.

Here, the vesting orders are clearly of the *right, title and interest* variety. The judgment below so decrees (R. 77). Respondent so concedes. Thus, in his brief below (p. 5), respondent said:

" * * * The orders, however, contain no finding that prior to vesting the German banks were in truth entitled to the entire balances of the accounts as stated on Chase's books. Appellee agrees with appellants that the vesting orders in this case left open for subsequent judicial determination the amount of the debts actually owing to the German banks and the valid ownership interests, if any, acquired in the accounts by third persons. The Custodian has likewise conceded that the demand letters which he served upon Chase [R. 11-13, 16-18] are not equivalent to turn-over directives which, had they been issued in implementation of the vesting orders, would have constituted a determination that a specific designated corpus was enemy property required to be delivered to the federal authorities * * * " ¹⁰

Having chosen to waive his right to immediate custody and to have a judicial determination of adverse rights in the vested property at the outset, the Custodian could not take the vested bank accounts free of the attachment unless he established that the attachment was void as against the German banks, whose interests, alone, he claims.

Petitioner says that he validly attached the Chase accounts. The attachment impressed a lien upon these accounts to secure his judgment.¹¹ Therefore, when the later vesting orders were made, the interest of the German banks

¹⁰ In his brief in the District Court, respondent put the matter thus: "In fine, the Custodian purported to vest only whatever interest the German banks might have had in the account * * *. The range of inquiry, therefore, open to this Court is *identical* with that in *Markham v. Allen*, 326 U. S. 490, 494 * * * where the Custodian vested only the 'right, title and interest' of enemies to certain property, reserving for an appropriate court in a proceeding of the present nature a determination of the *quantum* of interest acquired under his Vesting Orders."

¹¹ This is the law of New York. *Post*, p. 32, footnote 29.

in the Chase accounts was limited to the residue, remaining after satisfaction of his attachment lien. The Custodian took only this residue—no more.

Respondent would agree, except for the impact of Executive Order No. 8389. In his brief in the District Court he said, "But for the impact of Executive Order No. 8389 as amended, and regulations of the Treasury Department issued pursuant thereto, it is conceded that under the law of New York both the attaching creditors and the Sheriff would have acquired liens on the applicable funds through the attachments and levies." However, he said, "the application of the Executive Order prior to the issuance of the attachment and levies barred the acquisition of any interest by the respondents in the property through judicial process or otherwise."

The merits of the case turn upon whether, under the freezing controls of Executive Order 8389 as applied by the Treasury Department, frozen funds could be validly attached.

II

The attachment of frozen funds was permitted by the freezing control program. Therefore, respondent vested subject to petitioner's attachment.

Petitioner attached on December 11, 1941. The levy preceded war with Germany.¹² The Trading with the Enemy Act was not then in force as to Germany. At that time, the Custodian was without power to vest the attached

¹² Petitioner attached on December 11, 1941, at 2:41 P. M., Eastern Standard Time (R. 67). War with Germany began on December 11, 1941, at 3:05 P. M., Eastern Standard Time (55 Stat. 796).

property.¹³ The United States, neither directly nor through any agency, did, or could, claim any proprietary interest in the attached accounts.

Petitioner's attachment created no contest between himself and the United States. The parties to the state court litigation were—and remained throughout—petitioner as plaintiff and the German banks as defendants.

Except for the later limited vesting orders, respondent would have no standing to question the validity of the attachment. By these orders, he deliberately chose the status of successor to the rights of the German banks. He asserts their rights as their privy. It is as if the German banks were here contesting the validity of petitioner's attachment made on December 11, 1941. If they could not prevail, neither can respondent.

The German banks could not have employed the freezing controls to defeat the attachment because—

(a) the freezing controls were protection against—not for—German nationals,

(b) the Secretary of the Treasury authorized attachment of frozen funds; and

(c) petitioner's attachment is clearly valid under this Court's holding in *Lyon v. Singer* and *Lyon v. Banque Mellie Iran*.

¹³ The Custodian had no power to vest German property until the Trading with the Enemy Act became effective as to Germany at midnight on December 11, 1941. Trading with the Enemy Act, § 2 (50 U. S. C. A., Appendix).

The freezing controls were a peacetime emergency measure designed to protect, against Axis conquest, property here belonging to nationals of the invaded countries. Suits by Americans against frozen property were not proscribed.

The freezing controls rest upon the authority given to the President by Sec. 5(b) of the Trading with the Enemy Act.¹⁴

When Germany invaded Norway and Denmark, the President declared a national emergency. This declaration reactivated his powers under Sec. 5(b) of the Trading with the Enemy Act. It enabled him to employ these powers to protect against German conquest securities and credits located here, belonging to Norway and Denmark and their nationals. Sec. 5(b) made these powers available to the President in time of "national emergency" as well as during time of war. The remainder of the Trading with the Enemy Act—including the vesting power—was effective only in war time.¹⁵

Acting under Sec. 5(b), on April 10, 1940, the President issued Executive Order 8389 (5 F. R. 1400), freezing desig-

¹⁴ § 5(b) was enacted originally in 1917 as part of the Trading with the Enemy Act [40 Stat. 411, § 5(b)]. It was a catch-all enabling control of transactions not otherwise controlled by that act. The end of the first World War terminated the effectiveness of § 5(b) as well as the other controls of the Trading with the Enemy Act.

§ 5(b)—alone—was revised on March 9, 1933, to meet the domestic crisis engendered by the depression. On that day, it was amended so that the powers granted would be available to the President in war or "during any other period of national emergency declared by the President" (48 Stat. 1). The amendment was directed to the domestic crisis solely. The obvious purpose of the amendment was to enable the President to suspend payments by the banks to prevent the current runs and, thus, to halt the alarming numbers of bank failures.

¹⁵ The remainder of the Trading with the Enemy Act was reactivated as to Germany at midnight, December 11, 1941. *Trading with the Enemy Act*, § 2 (50 U. S. C. A., appendix); *Markham v. Cabell*, 326 U. S. 404, 407 n. 2.

nated property in the United States in which "Norway or Denmark" or any national thereof has at any time on or since April 8, 1940, had any interest."

To confirm and clarify the President's action, Senator Wagner, at the instance of the Treasury Department, introduced into Congress the Joint Resolution, enacted on May 7, 1940 (54 Stat. 179; Appendix, p. 47).¹⁶ Executive Order 8389 was an exercise by the President of the authority granted by this Joint Resolution. Initially, the Order dealt only with the local assets of Danish and Norwegian nationals. On June 14, 1941, the President extended its application to nationals of Germany, among others (Exec. Order 8785; 6 F. R. 2897). Executive Order 8389 followed, closely, the language of the Joint Resolution. Sec. 1 of the Order—the portion material here—provides as follows (5 F. R. 1400, as amended June 14, 1941, 6 F. R. 2897):

"Section 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

"A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside the United States);

¹⁶ H. Rep. No. 2009, 76th Cong., 3rd Sess., 1940; S. Rep. No. 1946, 76th Cong., 3rd Sess., 1940; Sen. Wagner in 86 Cong. Rec., p. 5006.

"B. All payments by or to any banking institution within the United States;

.

"E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States."

.

The Joint Resolution—and the Executive Order—left much unsaid. Other than specifying the property and transactions covered, it did not define the scope of the granted powers. It specified no standards to which the Executive must conform in granting or withholding authority for any transaction. It afforded no remedy—in court or otherwise—to any person aggrieved by any action of the Executive.¹⁷

Despite these uncertainties, it is clear that the Joint Resolution of May 7, 1940, did not, and could not, empower the United States to expropriate frozen funds. The Fifth Amendment protects alien and citizen alike. The property of neither may be confiscated. *Russian Volunteer Fleet v. United States*, 282 U. S. 481, 489, 491-2. The Joint Resolution was intended merely to protect the assets here of Axis-invaded countries and their nationals from seizure by the Axis at gun point.¹⁸ To this end the President was

¹⁷ At the commencement of the war, the Treasury controlled some \$7,000,000,000 of frozen alien property. (H. Rep. No. 1507, 77th Cong., 1st Sess. 1941, p. 3.) It is a little startling to think that, under our form of government, the Executive would claim, as respondent does here, that the controls gave the Executive unbridled peacetime control over this huge amount of property so that he could, at will, forbid the courts to adjudicate with regard to it and preclude American citizens from satisfying legitimate claims out of it.

¹⁸ The Joint Resolution was offered in Congress by Senator Wagner, Chairman of the Committee on Banking and Currency, which had reported out of the Resolution. In his own words,

" * * * The purpose of the joint resolution, of course, is very clear. We want to protect property within the jurisdiction of

given the peacetime power to screen transactions in frozen property and to withhold sanction from those resting upon Axis conquest. Legitimate transactions were to be unaffected.¹⁹ The frozen property was to continue subject to the claims of Americans.²⁰

Thus, Congress established the freezing controls as an instrument to be used solely against Axis aggression. They were a check on the use of frozen property by the Axis—not a device to immunize frozen funds from the legitimate claims of American citizens.

The Joint Resolution did not purport to restrict in any way the right of an American citizen to sue a blocked national *in personam* or by attachment of his funds. To imply such a restriction—as the courts below have done—would be to proscribe in peace what was clearly permitted even during the exigencies of war. It is settled—both at common law and under the Trading with the Enemy Act—that, despite the existence of war, a citizen may sue the enemy and attach his property. *Watts, Watts & Co. v. Unione Austriaca Navigazione etc.*, 248 U. S. 9; *Trading with the Enemy Act*, § 7(b); 137 A. L. R. 1369, note. Noth-

the United States which is owned by these governments [Norway and Denmark] or their nationals" (86 Cong. Rec., 5006).

See also: Sen. Glass in 86 Cong. Rec., 5175-5176, and Sen. Connally in 86 Cong. Rec., 5007.

¹⁹ "Mr. Wagner. * * * I wish to emphasize the point that *this does not absolutely prohibit the transfers, it merely provides that the Government may investigate to determine whether the transfer was made voluntarily or under duress, to be perfectly candid. If the transfer is voluntarily made, our Government, of course, will in no way interfere.* But where the transfer is induced, as can be easily established, by duress, we have a right to protect the national of any country against that sort of an imposition, using a very mild term, with respect to securities and other evidences of ownership subject to our laws" (86 Cong. Rec., 5007). (Italics supplied.)

"Mr. Wagner. *The joint resolution does not absolutely prohibit any transaction. It simply contemplates, if an Executive order is issued, that each transaction be scrutinized to determine whether it was bona fide or accomplished through duress.*" (Italics supplied.)

"Mr. Barkley. That is right" (86 Cong. Rec., 5175-5176).

²⁰ Senators Barkley and Wagner in 86 Cong. Rec., 5006.

ing in the Joint Resolution indicates any purpose to forbid in peace what was permitted under Sec. 5(b) in time of war. [Cf. Sec. 5(b), as enacted during the First World War (40 Stat. 411 and 40 Stat. 966) with the Joint Resolution (48 Stat. 1).] In essence, this is conceded by respondent's stipulation that the attachment of frozen property "was not forbidden" by the freezing controls and that "a license to institute the action and levy the attachment was in fact not required" (R. 66).

Since the Joint Resolution permitted suit, including attachment actions, against blocked nationals or alien enemies, the German banks would have no standing to assert the freezing controls as a defense to petitioner's attachment. Respondent—as successor to the German banks—has no better right (*supra*, p. 15).

Despite this, the Court below has permitted the claims of the German banks to prevail over the pre-war attachment of petitioner, an American citizen. As construed below, the freezing controls cloak the German banks with immunity from attachment of their property by American citizens. So construed, the controls are distorted from a check upon German nationals to a device for their protection. *Porter v. Freudenberg* [1915], 1 K. B. 857, 880.

B

The Secretary of the Treasury authorized the attachment of frozen funds.

While, as just shown, the freezing controls did not embrace attachments of frozen funds, it would not matter here if the fact were otherwise. The Congressional Joint Resolution empowered the President to authorize transactions in frozen property, even if they were within the ambit of the Resolution. By Executive Order 8389, Section 7, the President delegated this power to the Secretary of the Treasury. The manner in which the Secretary exercised this power in respect to the attachment of frozen funds is agreed upon here. It is formally stipulated in this case as follows (R. 65-7):

1. From the inception of freezing controls the Secretary of the Treasury ruled that "the bringing of an action, the issuance of a warrant of attachment therein, and the levy thereunder upon blocked property found within the jurisdiction of the court which issued the warrant, were not forbidden but that a license was required to be secured before payment could be made from the blocked account to satisfy any judgment recovered in such action."

2. "A license to institute the action [by attachment] and levy the attachment was in fact not required by the Treasury Department."

3. In all cases in which litigants proposed to sue by attachment and applied to the Treasury for a license to attach,²² the Secretary made it clear that no license was necessary by a ruling or instruction of the following nature:

"Under Executive Order No. 8389, as amended, and the Regulations issued thereunder, no attempt is made to limit the bringing of suits in the courts of the United States or of any of the States. However, should you secure a judgment against one of the parties referred to in your letter, which is a country covered by the Order, or a national thereof, a license would have to be secured before payment could be made from accounts in banking institutions within the United States in the name of such country or national."^{22a}

4. The Treasury at various times licensed payments out of frozen funds to satisfy judgments in attachment actions, "notwithstanding that a particular license to institute the action and levy the attachment was not procured by a plaintiff and judgment-creditor."

²² Such applications ran "into the hundreds." Brief (p. 39) of the Treasury Department as *amicus curiae* in *Commission for Polish Relief v. Banca Nationala a Rumaniei*, 288 N. Y. 332.

^{22a} It matters not that this ruling was not made by license. Exec. Ord. 8389 empowered the Treasury to grant the authority not alone by "regulations * * * or licenses." It could do so by "instructions * * * or otherwise." The rights to attach frozen funds did not depend on the mode used by the Treasury in granting the authority, so long as the authority was given.

In so ruling, the Treasury merely complied with established law. The Trading with the Enemy Act permitted suit by attachment against blocked nationals or alien enemies (*supra*, p. 22). As the Treasury's authority rested solely on Section 5(b) of that Act, he did not limit (R. 65-6), and could not have limited, the bringing of such suits.

The Treasury took pains to assure the New York courts that it meant what it said when it ruled that frozen funds could be attached. As *amicus curiae* in *Comm. for Polish Relief v. Banca Nationala a Rumaniei*, 288 N. Y. 332, the Treasury informed the New York State Court of Appeals that "From the terms of the statement [quoted in the stipulation of fact here (R. 66)], it may be clearly seen that the Secretary of the Treasury authorized the bringing of an attachment action".²³ The Treasury advised the New York Court of Appeals to hold "that the Courts of the State of New York do have jurisdiction to litigate by attachment of blocked properties the rights and liabilities of litigants, consistent with the administration by the Federal Government of the freezing control laws."²³ It urged the Court to uphold the attachment notwithstanding the fact that a license to levy the attachment had been sought by the Commission for Polish Relief and refused by the Treasury.²⁴

The New York State Court of Appeals followed the Treasury's ruling. It upheld the attachment in the *Polish Relief* case, ruling that blocked funds may be attached and the action reduced to judgment, subject to a license under the federal controls as a condition precedent to payment of the attached blocked funds in satisfaction of the judgment. The state courts of New York have consistently adhered to this view of the controls—stipulated to here—

²³ Brief (p. 39) of Treasury Dept. as *amicus* in *Comm. for Polish Relief v. Banca Nationala a Rumaniei*, 288 N. Y. 332.

²⁴ Brief (p. 41) of Treasury Dept. as *amicus* in *Comm. for Polish Relief v. Banca Nationala a Rumaniei*, 288 N. Y. 332.

in dealing with litigation involving blocked property. The litigation has been permitted to proceed, but payment of the judgment has been made to await the sanction of a federal license under the freezing controls.²⁵ On June 5, 1950, this Court approved this view of the controls. *Lyon v. Singer* and *Lyon v. Banque Mellie Iran*, 339 U. S. 841.

Respondent concedes that the controls did not proscribe attachment of frozen funds. In his brief in the Court of Appeals (p. 24), he said:

"Appellants stress throughout their briefs that a license was not required to institute a suit by attachment. Appellee concedes this and has so stipulated."

This concession, we believe, is decisive of the case. Since it is agreed that petitioner's attachment was permitted, petitioner's attachment levy under New York law effected (a) a seizure of the attached funds [N. Y. *Civ. Prac. Act*, Section 916, subdivision 3], and (b) the creation of a lien upon the attached funds to secure petitioner's state court judgment.²⁶ Both the Trading with the Enemy Act and the Fifth Amendment require that these rights of

²⁵ *Singer v. Yokohama Specie Bank*, 293 N. Y. 542, 299 N. Y. 113, 299 N. Y. 791, in which the U. S. appeared as *amicus*, aff'd 339 U. S. 841; *Leeds v. Guaranty Trust Co.*, 65 N. Y. S. 2d 431, aff'd 272 N. Y. App. Div. 909, aff'd 297 N. Y. 1019, in which the U. S. appeared as *amicus*; *Feuchtwanger v. Central Hanover Bank & Trust Co.*, 288 N. Y. 342; *Metallo-Chemical Corp. v. Banque Transatlantique S.A.*, 188 N. Y. Misc. 596; *Bollack v. Societe General, etc.*, 263 N. Y. App. Div. 601; *R. & L. Goldmuntz, Sprl. v. Fisher*, 54 N. Y. S. 2d 635; *Drewry v. Onassis*, 188 N. Y. Misc. 912, 914, aff'd 272 N. Y. App. Div. 870; *Cable & Wireless, Ltd. v. Yokohama Specie Bank*, 191 N. Y. Misc. 567; *Suomen Pankki v. Bell*, 80 N. Y. S. 2d 821, 829.

At least one federal court has taken the same view. See *Sun Insurance Office, Ltd. v. Arauca Fund* (S. D. Fla.), 84 F. Supp. 516, 518.

²⁶ Resort must be had to New York law to determine the incidents of petitioner's attachment. *Clark v. Willard*, 294 U. S. 211, 213. The New York cases holding that an attachment impresses a lien on the attached property are cited *post*, p. 32, footnote 29.

the petitioner be respected. Respondent's vesting was subject to petitioner's attachment rights. *Trading with the Enemy Act*, Sections 8, 9; *U. S. v. The Antoinetta*, 153 F. 2d 138; *Miller v. Kaliwerke*, 283 F. 746, 757-8; *Becker Steel Co. v. Cummings*, 296 U. S. 74, 79; *Mayer v. Garvan*, 278 F. 27, 34.

In the endeavor to check the force of his concession, respondent asserted below that, although the Secretary of the Treasury authorized an attachment under New York law, the attachment was null and void when levied. It would become validated *ab initio*, he argued, if and when the Treasury licensed payment of plaintiff's judgment in the attachment action.

Respondent misapprehends the attachment process. In New York ~~as elsewhere~~—an attachment to be good, must seize the property and impress it with a lien before the judgment—not later.

Respondent's view would require a wholesale revision of the law of attachment. The Treasury's ruling—stipulated to here—indicates no purpose so to revise the attachment law of New York or of any of the states. Nothing in the Joint Resolution of May 7, 1940 or in Exec. Order 8389 granted such legislative power.

In truth, *Pennoyer v. Neff*, 95 U. S. 714, 727, forbids a judgment resting upon an attachment having the attributes suggested by respondent. Under *Pennoyer*, it is only because the attachment has seized the property and brought it under the control of the court *before* judgment, that the Federal Constitution permits an adjudication binding the property seized. The power of the court to adjudicate "at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment." *Pennoyer v. Neff*, *supra*, p. 728. To paraphrase *Pennoyer v. Neff*, *supra*, p. 728, "The judgment, if void when rendered, will always remain void; it cannot occupy the doubtful position of being valid" if execution is licensed by the Treasury under the freezing controls, "and void if there be" no license.

It must be assumed that the Treasury understood these constitutional requisites of a valid attachment. The Treasury's ruling must be construed to have authorized an attachment which would fulfill those requisites, i.e., an attachment effective when levied. It cannot be construed to have authorized the courts to proceed in a manner which the Federal Constitution forbade. *Josephberg v. Markham*, 2nd Cir., 152 F. 2d 644, 659; *Fed. Trade Com. v. Am. Tobacco Co.*; 264 U. S. 298, 307.

There were practical reasons why the Secretary of the Treasury, in authorizing the attachment of frozen funds, should have intended a valid attachment. His, alone, was the responsibility of issuing or withholding the license needed before frozen funds could be applied to satisfaction of the judgment recovered in the attachment action. It was of concern to him—as well as to the litigants—that the judgment, payment of which was to be licensed, should have no patent infirmity.

By ruling that frozen funds could be validly attached, the Secretary removed all doubt as to the Constitutional validity of the judgment without impairing, in any way, his ability and right to screen the payment of the judgment for compliance with the policy underlying the freezing controls.

The Treasury did rule that a license was required to apply the frozen funds to the judgment. This in no way affected the validity of the attachment or the ensuing judgment. Their validity depended upon what took place prior to the judgment—not upon post-judgment facts. *Pennoyer v. Neff*, *supra*, page 728.

Both the Treasury and the Alien Property Custodian have licensed the transfer of attached frozen funds to satisfy judgments obtained in actions begun by unlicensed attachments of such funds (R. 66-7). Such action is inexplicable except upon the hypothesis that a valid attachment of frozen funds was permitted. Unless the attachment were valid, the judgment would be a nullity under *Pennoyer v. Neff*. It cannot be supposed that the Secretary, in ruling that a license was required to satisfy the

judgment out of frozen funds, meant to reserve the authority to license, as valid, payment of a judgment resting upon an attachment which would be a nullity under the construction of the controls attributed to him by respondent. The Treasury would have no occasion to license execution upon a void judgment. There would, indeed, be nothing to license.

Respondent's position would force the conclusion that both the Treasury and the Custodian have authorized the use of frozen funds to pay judgments patently void for constitutional reasons under *Pennoyer v. Neff*. Every garnishee bank and the Sheriff would now be open to suit by the defendant in the attachment action to recover the monies paid in satisfaction of these "void" judgments.

It is impossible to believe that the Treasury, in authorizing and encouraging litigants to proceed by attachment and persuading the New York Courts to uphold such attachments, intended consequences so monstrous. On the contrary, by licensing the transfer of the attached frozen funds to pay the judgments, the Treasury re-affirmed its stand that frozen funds were subject to valid attachment.

C

Petitioner's attachment is clearly valid under this Court's holding in *Lyon v. Singer* and *Lyon v. Banque Mellie Iran*. These cases—not *Propper v. Clark*—should have been followed here.

In *Singer v. Yokohama Specie Bank*, 293 N. Y. 542, 299 N. Y. 113 and 791 and *Banque Mellie Iran v. Yokohama Specie Bank*, 299 N. Y. 143 and 791, the New York State Court of Appeals held that unlicensed voluntary transactions, in blocked Japanese funds, gave rise to valid rights in the transferees of the blocked property, which would support a judgment (enforceable *in rem* under *Ticonic National Bank v. Sprague*, 303 U. S. 406, 412), against the property of the blocked national (Yokohama Specie Bank) in liquidation proceedings conducted by the New York

Superintendent of Banking. Specifically, " * * * it was held that the provisions of Executive Order No. 8389, as amended, 12 U. S. C. A. § 95a, and the rules and regulations issued pursuant thereto did not prevent the accrual or creation of the claim sued upon or render such claim void, but merely prevented the payment of the claim until an appropriate Federal license is obtained * * * " (299 N. Y. 113).

This Court affirmed these cases in *Lyon v. Singer* and *Lyon v. Banque Mellie Iran*, 339 U. S. 841, notwithstanding that:

1. the judgment so affirmed enforced rights which arose out of unlicensed transactions in frozen funds;
2. the litigation and judgment had never been licensed by the Treasury;
3. the Treasury had twice refused to license payment of the claims sued on in the *Singer* case²⁷; and
4. prior to the judgments, the Custodian had vested "The excess proceeds of the business and property in the State of New York of the Yokohama Specie Bank".

By its judgment, affirming these cases, this Court sanctioned the view of the freezing controls expressed by the New York State Court in the *Polish Relief* case and followed by it consistently since. It rejected the contentions advanced by respondent as *amicus* in the *Singer* and *Mellie Iran* cases and also urged by him below in this case. We believe it is fair to say that this Court, in affirming these cases, has approved the view—first espoused in the *Polish Relief* case—that the freezing controls did not prevent the creation of rights against frozen funds by litigation so long as payment of the judgment was made to await Federal license.

Under this Court's holding in *Singer* and *Mellie Iran*, petitioner was clearly entitled to prevail below. His case

²⁷ *Singer v. Yokohama Specie Bank*, 299 N. Y. 113.

not only parallels *Singer* and *Mellie Iran* but, in certain decisive aspects, is decidedly stronger. In *Singer* and *Mellie Iran* the transactions underlying the judgment were voluntarily engaged in by two blocked nationals. The transactions were wholly unauthorized under the freezing controls. Here, petitioner, an American citizen, attached the funds of the German banks *in invitum* and pursuant to admitted Treasury authority. The cause of action which underlay his attachment arose in 1937 (R. 49) and predated the freezing controls.²⁸

If, in *Singer* and *Mellie Iran*, the unauthorized blocked transactions^{28a} there involved gave rise to enforceable rights, it follows, *a fortiori*, that petitioner's attachment, authorized under the freezing controls and levied to enforce a claim which predated freezing, gave rise to a valid attachment lien. In deciding to the contrary, the court below held directly in conflict with the *Singer* and *Mellie Iran* cases.

The court below mistakenly assumed that this case was controlled by *Propper v. Clark*, 337 U. S. 472. The basis for such an assumption is destroyed by this Court's holding in *Singer* and *Mellie Iran* that the authority of the *Propper* case is limited to a "claim of title to frozen assets adversely to the Custodian" by one seeking "to deny the Custodian's paramount power to vest" 339 U. S. 841, 842-3. The instant case is distinguishable from the *Propper* case in both aspects.

(1) *Petitioner's attachment—in contrast to the receivership order in the Propper case—involved no claim*

²⁸ Since the transaction which underlays Zittman's attachment took place in 1937 (R. 48-49), it was not subject to the freezing controls which as to German nationals became effective June 14, 1941 (Exec. Ord. 8785, 6 F. R. 2897). This is in sharp contrast to the *Singer* and *Mellie Iran* claims which both arose and were sued on after the freeze date.

^{28a} In the case of *Banque Mellie Iran*, the blocked Japanese transaction sued upon occurred on December 2, 1941—six days before we were at war with Japan.

of title. It created only the attachment lien required for in rem jurisdiction.

Under New York law, the levy of an attachment impresses a lien upon the attached funds at the outset of the action.²⁹ In this way, the preliminary seizure constitutionally necessary for *in rem* jurisdiction is achieved and the attachment action can proceed.³⁰ Title to the attached funds—despite the attachment—remains in the defendant.³¹ Therefore, the attachment effects no transfer. There is no shift in title—as in *Propper v. Clark*—which requires the sanction of the Treasury under the Executive Order.

If the plaintiff in the attachment action recovers a judgment, the attached funds, when execution issues against them, are applied in satisfaction of the judgment (N. Y. Civ. Prac. Act, §§969, 645). If execution issues, then only—for the first time in the attachment action—does title to the attached frozen funds become involved in the litigation. At the point of execution—and here alone—the freezing controls apply. It is the execution against the frozen funds which portends the change in title. It is the execu-

²⁹ The effect of an attachment under New York law is well established. The levy of the warrant impresses a lien upon the attached property as "security for the judgment the plaintiff may recover." If the plaintiff recovers, "the lien becomes absolute, relating back to the time of the levy, and taking its priority from that date." *Fielmann v. Brunner* (1st Dept., 1874), 2 Hun 354, 356; *Van Camp v. Scarle* (5th Dept., 1894), 79 Hun 134, 143, mod. 147 N. Y. 150; *Lynch v. Crary*, 52 N. Y. 181, 184; *Embree v. Hanna*, 5 Johns. 101, 103; *Logan v. Greenwich Trust Co.* (1st Dept., 1911), 144 App. Div. 372, 378, aff'd 203 N. Y. 611; *West Virginia P. & P. Co. v. People's Home Journal, Inc.* (1st Dept., 1931), 233 App. Div. 376, 378; *Sanders v. Armour Fertilizer Works*, 292 U. S. 190, 208; *Elkay Reflector Corp. v. Savory, Inc.* (C. C. A. 2nd, 1932), 57 F. 2d 161; *Steingut v. Nat. City Bk.* (S. D. N. Y., 1941), 38 F. Supp. 451, 452.

³⁰ *Pennoyer v. Neff*, 95 U. S. 714, 727, 728, 733.

³¹ *Klinck v. Kelly*, 63 Barb. 622; *Columbia Bank v. Ingersoll* (Sup. Ct. N. Y., 1888), 21 Abb. N. Cas. 241; *Starr v. Moore*, 22 F. Cas. No. 13315, 3 McLean 354. This is the rule generally. See 7 C. T. S. page 415.

tion—not the attachment or judgment—which must be licensed under the Treasury's ruling. So the Treasury itself has said (R. 66). Until execution upon the judgment, there has been, and can be, no transfer of title as in *Propper v. Clark, supra*. Here, it is conceded that execution has not issued (R. 5).

Since everything done by the state court, including entry of petitioner's judgment, was concededly authorized by the Secretary of the Treasury, since execution has not issued and since the parties are agreed that execution cannot issue without an appropriate federal license, it is clear that the proceedings in the state court have in no way impinged upon the federal controls. So this Court has held in the *Singer* and *Mellie Iran* cases. These cases—not *Propper v. Clark*—should have been followed below.

(2) *Only the rights of the German banks—not the Custodian's vesting power—is in issue here.*

Here, as in *Singer* and *Mellie Iran*, the Custodian's power to vest is not in issue. Respondent admits that the Custodian's vesting orders extend only to the residual interest in the attached accounts remaining in the German banks. Petitioner concedes that the Custodian is entitled to what he vested. Petitioner's point is that the Custodian has been awarded more than he vested. The judgment gives the Custodian the whole of the attached accounts free of petitioner's valid attachment rights.

It is true that, had the Custodian exercised his paramount power to vest by *res* vesting orders, he could have taken, summarily, the whole of the attached accounts. However, such *res* vesting orders, had they issued, would not have affected petitioner's rights by reason of the attachment. Despite such vesting, petitioner would still have the right to assert and enforce his attachment rights in a proceeding against the Custodian under Section 9 of the Trading with the Enemy Act. *Central Union Trust Co. v. Garvan*, 254 U. S. 554, 569; *Stoeckert v. Wallace*, 255 U. S. 239, 245-6. The

Custodian would have to respect those rights. The vesting power—whether exerted by *res* or *right, title and interest* orders—is limited by the Fifth Amendment. The latter so requires. *Miller v. Kaliwerke, etc.*, 283 Fed. 746, 757-8; *Commercial T. Co. v. Miller*, 281 Fed. 804, 806, aff'd 262 U. S. 51; *Becker Steel Co. v. Cummings*, 296 U. S. 74, 79; *Garvan v. \$20,000 Bonds*, 265 Fed. 477, 479.

By choosing to vest only the right, title and interest of the German banks, as adjudicated by the Court, the Custodian waived his paramount right to immediate preliminary custody of the vested property and invited an adjudication which would—and here does—preclude a later Section 9 suit by petitioner. That the Custodian forced petitioner to adjudicate now and to forego a later suit under Section 9 of the Trading with the Enemy Act, did not in any way alter petitioner's rights. These must be respected here as well as in a Section 9 suit.

The Custodian's "paramount power to vest" is no more in issue here than it was in *Singer* and *Mellie Iran*.

Essentially, this case is like *Singer* and *Mellie Iran*. In the latter, the Custodian vested the excess assets of the New York agency of the Yokohama Specie Bank, in liquidation, remaining after satisfaction of the claims allowed in the liquidation proceeding. This parallels the scope of the vesting orders in the instant case. The claims of *Singer* and *Banque Mellie Iran* sustained by this Court will, if a license issues, necessarily diminish, *pro tanto*, the residue which the Custodian will take. Recognition of petitioner's attachment rights in the instant case would affect the Custodian in precisely the same way.

Since the Custodian's power to vest is not in issue here, there is no parallel between this case and *Propper v. Clark*.

The court below failed to observe that, in *Propper v. Clark*, the question was whether "the freezing order made invalid any subsequent *transfer of title* by judicial action" 337 U. S. 472, 477, and that there (a) this Court carefully premised its "determination on the purpose of Congress to prevent *shifts in title* to blocked assets," 337 U. S. 472, 486 and (b) expressly refused to decide "whether every deter-

mination of rights concerning blocked property in unlicensed litigation is voidable," 337 U. S. 472, 486. (Emphasis supplied.) The lower court overlooked the fact that this Court very carefully limited its holding to the particular facts of the *Propper* case and reserved for future decision the impact of the freezing controls in other cases. The rule for other cases has now been made in *Singer* and *Mellie Iran*. By these cases this Court has decided that the freezing controls permitted a valid determination of rights concerning blocked property even though both the litigation and the transaction underlying it had not been authorized by federal authority so long as the judgment was not consummated by a change of title. In the instant case, not only is title to the attached funds unchanged by the attachment or judgment but it is conceded that petitioner attached with federal authority, to enforce a cause of action which arose in 1937 before the effective date of freezing. For these reasons, the instant case—even more than *Singer* and *Mellie Iran*—falls beyond the range of the *Propper* case.

* * * * *

Since the Custodian may confiscate only the interests of the German banks in the vested bank accounts and since, by his attachment and judgment, petitioner acquired valid rights in the vested bank accounts superior to those of the German banks, the courts below erred in granting a decree to respondent which destroys petitioner's rights.

III

General Ruling No. 12, issued April 21, 1942, cannot be employed to defeat petitioner's attachment because the Ruling (a) does not have retroactive force and (b) if properly construed, permits a valid attachment of frozen funds.

On December 11, 1941—when petitioner attached—the freezing controls rested wholly on the Joint Resolution. It is stipulated here that, under those controls, the Treasury made "no attempt to limit" attachments (R. 66).

Respondent does not claim that there was any impediment to petitioner's attachment on December 11, 1941. He contends, however, that the validity of what was done on December 11, 1941, must be tested by General Ruling No. 12 (7 F. R. 2991), issued over four months later on April 21, 1942.³² He says that General Ruling 12 must be applied retroactively and that, so applied, it voids petitioner's attachment. We believe that respondent misapprehends the force of the Ruling.

A

General Ruling No. 12 cannot operate retroactively.

General Ruling 12 was issued on April 21, 1942—more than four months after petitioner had attached.³³ It had the sanction of harsh criminal penalties (Exec. Order 8389, Sec. 8). Therefore, the Constitution forbade its application retroactively to void petitioner's attachment. *Addy v. U. S.*, 264 U. S. 239, 244-245; *Chew Heong v. U. S.*, 112 U. S. 536.³⁴ This was fully appreciated by this Court, when it said in *Propper v. Clark*, 337 U. S. 472, 485:

³² Gen. Ruling 12 was adopted on April 21, 1942. The Treasury's brief as *amicus* in the *Polish Relief* case is dated, and was filed, on April 22, 1942. The intimation is present in the Treasury's brief (p. 30, footnote 6) that Gen. Ruling 12 was adopted to shape the holding of the N. Y. Court of Appeals in the *Polish Relief* case. One commentator has said the following regarding this sequence of events:

" * * * This ruling was issued on April 21, 1942, and forms the basis for Point II in the Treasury brief, pp. 30-37, entitled 'Unauthorized Transfers of Property in Blocked Accounts are Invalid under General Ruling No. 12.' The brief was filed on April 22, 1942. Such incidents can hardly engender confidence in, or respect for, administrative practice * * *." Freutel, *Exchange Control, Freezing Orders and the Conflict of Laws*, 56 Harv. L. R. 30, at p. 67, footnote 158.

³³ Petitioner's judgment in the state court attachment action was entered on March 27, 1942. Thus, the judgment, too, antedated Gen. Ruling No. 12.

³⁴ Apart from constitutional limitations, Gen. Ruling 12 could not be given retrospective force. Administrative orders and rulings, as well as statutes, are not construed to operate retrospectively. *Miller v. U. S.*, 294 U. S. 435, 439; *Standard C. & M. Corp. v. Waugh C. Corp.*, 231 N. Y. 51.

"General Ruling No. 12, as it came after the suit by the receiver against ASCAP was started and after the order appointing petitioner as permanent receiver, is not treated by us as decisive in this case. It is useful only as a statement of the administrative determination as to the effect of the litigation without a license."

General Ruling 12 may apply to attachments made after it is issued. It cannot, in any legitimate sense, be a guide for construing the Secretary's earlier ruling—found in the stipulation here—issued in execution of the restricted authority of the Joint Resolution. The latter was the sole Congressional authority for the controls when petitioner attached on December 11, 1941.³⁵ *Ex parte Endo*, 323 U. S. 283, 302. It is conceded that nothing in the Joint Resolution or the Executive Order forbade petitioner's attachment.

B .

Properly construed, General Ruling No. 12 authorized a valid attachment of frozen funds.

Even if the Constitution did not forbid the retroactive application of General Ruling No. 12, the Ruling itself, properly construed, would sanction petitioner's attachment on December 11, 1941. Subd. (3) of General Ruling No. 12, provides that a transfer, if, at any time, licensed or **otherwise authorized** by the Secretary of the Treasury, is "enforceable to the same extent as it would be valid or enforceable but for . . . section 5(b) of the Trading with the Enemy Act," Exec. Order 8389 and regulations thereunder. (Emphasis supplied.) Since, concededly, petitioner's attachment was so authorized, its validity is expressly confirmed by Gen. Ruling No. 12.

³⁵ Under the holding in *Lyon v. Singer* and *Lyon v. Banque Mellie Iran*, 339 U. S. 841, even the First War Powers Act—enacted later—did not prevent the creation of valid rights in frozen funds as the result of unlicensed litigation.

Further, subd. (4) of Gen. Ruling 12—on which respondent relies—expressly makes “valid and enforceable” any transfer involved in, or arising out of any court proceeding “for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated.” In every attachment action the right of the Court to attach the property is necessarily one of the matters litigated and concluded by the judgment. *Ackerman v. Tobin*, 8th Cir., 22 F. 2d 541; *Green v. Van Buskirk*, 74 U. S. 139, 148. Therefore, the state court’s judgment in favor of petitioner against the German banks was an adjudication, binding on the German banks, that the funds were validly attached. As respondent was in privity with the German banks, he is equally bound by the judgment.

Respondent, ignoring subd. (3), insists that subd. (4), while permitting an adjudication of the rights and liabilities of the parties, must be read—due to the proviso^{35a}—as insulating the property which is the object of the suit from all of the consequences of the litigation until the judgment is licensed. This is a manifest contradiction. Where, as here, the suit is brought to fix the rights and liabilities of the parties in the attached property, the property must be seized at the outset of the suit and the judgment must affect the property when made. Otherwise, under the Fourteenth Amendment, the judgment decides nothing. *Pennoyer v. Neff*, *supra*. Respondent’s view of subd. (4) is, in effect, that it purports to permit an adjudication of rights and liabilities effective only if and when a post judgment license issues, whereas the law of *Pennoyer v. Neff*, forbids such an *in rem* adjudication. So construed, subd. (4) becomes an unintelligible contradiction and void under the Fifth Amendment. *Small Co. v. American Sugar Refining Co.*, 267 U. S. 233; *U. S. v. Cohen Grocery Co.*,

^{35a} We call attention to the fact that nothing comparable to the limiting language of the proviso appears in the authority to attach given by the Secretary of the Treasury prior to Gen. Ruling 12. (R. 66). On the contrary, under the prior authority “No attempt to limit” attachments or suits was made.

255 U. S. 81; *Standard C. & M. Corp. v. Waugh C. Corp.*, 231 N. Y. 51.

Since Subd. (4) purports to permit actions competent validly to determine "the rights and liabilities therein litigated", it must be considered to permit a valid attachment. Otherwise, where the action is *in rem.*, subd. (4) fails to achieve its expressed purpose.

To construe the General Ruling as authorizing a valid attachment of frozen funds is to make it valid and meaningful. To give it respondent's construction is to make it illogical, contradictory and opposed to the dictates of the Fifth and Fourteenth Amendments. Given this choice, the interpretation which is meaningful and constitutional should be adopted. *Burnet v. Chicago Portrait Co.*, 285 U. S. 1, 16; *Texas & P. R. Co. v. United States*, 289 U. S. 627, 640; *United States v. LaFranca*, 282 U. S. 568, 574; *Josephberg v. Markham*, 152 F. 2d 644, 659.

IV

The District Court should have refused to entertain this cause.

Six years before this proceeding was begun the state court, by an *in rem* judgment, had adjudicated the rights of petitioner and the German banks—through whom respondent claims—in the attached accounts. The adjudication necessarily decided, as between petitioner and the German banks, that the bank accounts were attachable. *Ackerman v. Tobin*, 8th Cir. 1927, 22 F. 2d 541, cert. den. 276 U. S. 628; *Clark v. Williard*, 294 U. S. 211, 213.

The state court adjudication, being *in rem*, is binding on respondent, who is in privity with the German banks. *In rem* judgments cannot be reviewed in collateral proceedings. Restatement of the law, *Judgments* § 34, g; *Ackerman v. Tobin*, *supra*.

Therefore, the District Court should have refused to decree the invalidity of the state court's seizure of the attached funds and its judgment which, under *Pennoyer*

v. *Neff*, 95 U. S. 714, derived validity solely from that seizure. Such is the measure of deference owed, as a matter of comity, between state and federal courts in contests over a *res* and, as a matter of right, under the full faith and credit clause of the Federal Constitution.

A

The judgment below is an unlawful collateral attack on the state court judgment.

The judgment of a court having jurisdiction, even if erroneous, may not be attacked in a collateral proceeding. Errors leading to the judgment must be corrected by the court which rendered the judgment or by appeal therefrom. The rule applies to judgments *in rem*, based on attachment, as well as those *in personam*. *Cooper v. Reynolds*, 77 U. S. 308, 319; *Mellen v. Moline Iron Works*, 131 U. S. 352, 367.

Petitioner's judgment against the German banks bound the attached bank accounts. Whether rightly or not, the bank accounts were seized and in the custody of the state court. N. Y. *Civ. Prac. Act*, § 916(3). Respondent tacitly recognized this fact, when he disavowed all right to a money judgment against the Chase Bank so long as the attachment levy stood. Here—in contrast to his method in *Propper v. Clark*—he chose merely to seek an adjudication that the state court judgment was invalid, not a money judgment. His position is, in essence, that although the state court seized the bank accounts, it should not have done so.

Such an attack challenges—not the power of the state court to deal with the attached funds but—the propriety of its having done so. *Grant v. Leach & Co.*, 280 U. S. 351, 359; *Chandler v. Peketz*, 297 U. S. 609.

Of such an attack this Court, speaking through Brandeis, J., said in *Lion Bonding & S. Co. v. Karatz*, 262 U. S. 77, 90:

“ * * * But if the legality of the state court's action was to be questioned, it could be done only by laying the proper foundation through appropriate proceedings in

that court. * * * If such action had been taken and relief had been denied there, resort could then have been had to appellate proceedings. *Wiswall v. Sampson*, 14 How. 52, 14 L. ed. 322. But the judgment of the state court, which had possession of the *res*, could not be set aside by a collateral attack in the federal courts. *Mutual Reserve Fund Life Asso. v. Phelps*, 190 U. S. 147, 159, 160, 47 L. ed. 987, 995, 23 Sup. Ct. Rep. 707. Nor could it be ignored. *Shields v. Coleman*, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570. Lower federal courts are not superior to state courts."

The judgment of the state court in petitioner's attachment action was binding until set aside in a direct proceeding. The power of the District Court was coordinate with—not superior to—that of the state court. Under the *Karatz* case it was bound to respect the judgment of the state court, not review it. This obligation follows from judicial precedent. *McLain v. Lance*, 5th Cir., 1944, 146 F. 2d 341, 345; *Leadville Coal Co. v. McCreery*, 141 U. S. 475, 477; *Nougue v. Clapp*, 101 U. S. 551; *Peck v. Jenness*, 7 How. (U. S.) 612, 624-626.

It follows, too, from the solemn injunction of the full faith and credit clause of the Federal Constitution. *U. S. Constitution*, Art. IV, Sec. 1; 28 *U. S. Code*, § 687; *American Surety Co. v. Baldwin*, 287 U. S. 156, 166; *Milwaukee County v. White Co.*, 296 U. S. 268; *Sanders v. Armour Fertilizer Works*, 292 U. S. 190; *Green v. Van Buskirk*, 74 U. S. 139; *Steingut v. National City Bank*, 38 F. Supp. 451; *Ackerman v. Tobin*, 8th Cir., 1927, 22 F. 2d 541; *Loewe v. Savings Bank of Danbury*, 2nd Cir., 1916, 236 F. 444, 448.

Since the German banks could not collaterally attack the state court's judgment, it was not open to respondent—their privy—to do so. *Mitchell v. First Nat. Bank*, 180 U. S. 471, 481; *Bigelow v. Old Dominion Copper Min. & S. Co.*, 225 U. S. 111, 129.

B

The judgment below interferes with the state court's custody and control of the attached debts in violation of the traditional rule of comity between state and federal courts.

For almost a hundred years it has been the settled rule of comity that, "when a state court and a court of the United States may each take jurisdiction of a matter [involving a *res*], the tribunal whose jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed, and the jurisdiction involved is exhausted." *Kline v. Burke Construction Co.*, 260 U. S. 226, 231; *Freeman v. Howe*, 24 How. 450. The rule is one of right. It arises from the necessity, in a federal system such as ours, of avoiding unseemly conflicts between our independent state and federal tribunals. This Court has acknowledged a "long recognized duty * * * to give effect to such 'methods of procedure as shall serve to conciliate the distinct and independent tribunals of the states and of the Union, so that they may cooperate as harmonious members of a judicial system coextensive with the United States'." *U. S. v. Bank of New York & Trust Co.*, 296 U. S. 463, 477.

The rule binds the Government even when pursuing a federal right. *U. S. v. Bank of New York & Trust Co.*, 296 U. S. 463, 479.

The state court was the first to take jurisdiction. The Sheriff, in levying petitioner's attachment, acted as an officer of the state. *Stojowski v. Banque de France*, 294 N. Y. 134, 135. By his levy, the state "seized" the attached debts.³⁶ *N. Y. Civ. Prac. Act*, §916 (3). The debts were then impressed with a lien to secure petitioner's recovery.

³⁶ The seizure was constructive since intangibles are not capable of manual seizure. In law, such a seizure is the equivalent of a manual seizure. *Comm. for Polish Relief v. Banca Nationala a Rumaniei*, 262 App. Div. 543, aff'd 288 N. Y. 332; *Security Savings Bank v. California*, 263 U. S. 282, 286; *Harris v. Balk*, 198 U. S. 215, 222, 223.

(See cases cited, *supra*, p. 32, footnote 29). The Chase Bank was bound by the seizure and lien. The statutory injunction forbade it "to make or suffer, any transfer or other disposition of, or interfere with * * * or pay over or otherwise dispose of any debt so levied upon * * * to any person, or persons, other than the sheriff serving" the warrant "except upon direction of the sheriff or pursuant to an order of the court". N. Y. Civ. Prac. Act, §917 (2). Disobedience by the Chase Bank would have meant fine and imprisonment as for a contempt. N. Y. Judiciary Law, §§ 750(3), 753(3), (8). And the sheriff was empowered to sue to compel payment of the debt to him. N. Y. Civ. Prac. Act, § 922.

By this constructive seizure, the state court took exclusive custody and control of the attached debts. *U. S. of Mexico v. Schmuck*, 294 N. Y. 265, 268; *Cooper v. Reynolds*, 10 Wall. 308, 316, 317; *Beardsley v. Ingraham*, 183 N. Y. 411, 420. Exclusive jurisdiction over the *res* so obtained continues in the state court "until its duty is fully performed, and the jurisdiction involved is exhausted." *Kline v. Burke Construction Co.*, 260 U. S. 226, 231. Here this event would occur only when petitioner's judgment was satisfied out of the attached funds. N. Y. Civ. Prac. Act, §§ 645, 520; *U. S. of Mexico v. Schmuck*, 294 N. Y. 265, 268.

With the attached debts so firmly lodged in the custody of the state court, it is clear that respondent could not have sued in the District Court for a money judgment. *U. S. v. Bank of New York & Trust Co.*, 296 U. S. 463. Respondent must have been cognizant of this bar when he chose to sue here for declaratory relief only. Did this choice of remedy reconcile the proceeding with the traditional rule of comity between state and federal courts? We believe not.

Respondent's position, as stated in his brief in the District Court, was that "only a declaration of rights" was sought. No order was asked "directing that the funds be surrendered to him." He admitted, however, that the declaration sought "will interfere with the possession of

the state court * * * to the extent that in later appropriate proceedings the state court will be bound to recognize the rights adjudicated here." This is to say that, by reason of the District Court's decree, the state court must void its custody and surrender the *res*. It is precisely this—an adjudication of the state court's title—which the rule of comity was designed to prevent. *Ex parte Baldwin*, 291 U. S. 610, 616; *Lion Bonding & S. Co. v. Karatz*, 262 U. S. 77, 89; *Peck v. Jenness*, 7 How. (U. S.) 612, 624-626.

The issue tends to be obscured here because the seizures were symbolic.³⁷ Petitioner's seizure rests upon the declaration of the statute, fortified by injunction. N. Y. *Civ. Prac. Act*, §§ 916(3), 917(2). Respondent's seizure rests upon his declaration, i.e., his vesting order and demand. Since both seizures rest upon declarations, they can be rescinded by declarations. The District Court has done precisely this. Disregarding the State Court's injunction, it has rescinded the State Court's seizure by declaring that none occurred, leaving respondent's seizure fully effective. That we are dealing here with symbolisms, should not obscure the fact that the District Court, by nullifying petitioner's attachment, has, in practical effect, laid its hand upon the property in dispute. It is this which the rule of comity forbids.

Markham v. Allen, 326 U. S. 490, does not hold otherwise. There, only rights *in personam* were involved. The Custodian did not—as here—attack the decree of probate or the right of the State Court to administer the estate. He recognized the validity of the State Court judgment and merely asked that he be permitted to take the fruits of it. This distinction is decisive. *U. S. v. Klein*, 303 U. S. 276.

³⁷ The Custodian's vesting order and demand were an *ex parte* seizure of the bank accounts in question. *Great Northern Ry. Co. v. Sutherland*, 273 U. S. 182, 191; *Commercial Trust Co. v. Miller*, 262 U. S. 51, 55. His application to the District Court was merely in aid of "the seizure which he effected at the time of his demand." *Miller v. Kaliwerke, etc.*, 2nd Cir., 283 F. 746, 752.

Petitioner's attachment was also an *in rem* seizure. *Pennoyer v. Neff*, 95 U. S. 714, 727; N. Y. *Civ. Prac. Act*, § 916(3).

282.^b *Markham v. Allen* would parallel the instant case only if in *Markham* the Custodian had premised his claim upon the invalidity of the executor's title or the nullity of the State Court's probate decree.

The vice of the decree below is not cured merely because the decree is declaratory and does not direct the Chase Bank to pay the attached debts to respondent. If the decree stands, *res adjudicata* will leave the state court no choice, as respondent himself notes, except to surrender custody of the attached debts so that they may be paid to respondent. The overtones of a plea of *res adjudicata* may seem gentler than the harsh directive of an order to pay. In actuality, the compulsion of the one is equally as forceful, ultimately, as that of the other. Whichever means is employed the end is the same—the state court is forced to surrender its jurisdiction. Neither method concedes to that court the respect which the rule of comity requires.

Since the State Court was the first to take jurisdiction here, the District Court, in obedience to the rule of comity, should have remitted the Custodian to that forum. The State Courts have shown themselves fully competent—and indeed, eager—to accord the Custodian every right to which he is entitled. *Matter of Viscom*, 270 N. Y. App. Div. 732; *Stern v. Newton*, 180 N. Y. Misc. 241. Therefore, the breach of comity here cannot be excused by any plea of necessity.

If, as here, the District Court may destroy the State Court's custody in contravention of the State Court judgment and injunction, the rule of comity becomes a mere form wholly denuded of its substance.

C

Declaratory relief should have been denied because respondent had an adequate and summary remedy in the prior state court proceeding.

For some unstated reason, respondent chose to test the validity of petitioner's attachment in the District Court.

Ever since the warrant was levied, the State Court has been—and still is—open to a summary application by respondent to test the validity of petitioner's attachment. N. Y. Civ. Prac. Act, § 948. Had respondent chosen so to act he could have obtained in one stroke, if so entitled, an adjudication of his title and a surrender by the State Court of its custody of the attached accounts. On such an application, the State Court, equally with the District Court, would have been bound to enforce the Federal law. *U. S. v. Bank of New York & Trust Co.*, 296 U. S. 463, 479.

Respondent admits that, despite the judgment below, he must still apply to the State Court to surrender its custody in order to enforce the rights decreed below. Upon such an application, the State Court may well inquire whether, under the full faith and credit clause of the Constitution, it is bound to recognize the judgment of the District Court as against its own. *Peck v. Jenness*, 7 How. (U. S.) 612, 624-626; *Leadville Coal Co. v. McCreery*, 141 U. S. 475-477; *Nougue v. Clapp*, 101 U. S. 551.

By choosing two proceedings to accomplish that which might have been done on one application to the State Court, respondent has multiplied the litigation. Even so, he has needlessly pitted the District Court against the State Court. The District Court should have refused to entertain this cause. *Brillhart v. Excess Ins. Co.*, 316 U. S. 491; *Carbide & Carbon C. Corp. v. U. S. I. Chemicals*, 4th Cir. 1944, 140 F. 2d 47; *McLain v. Lance*, 5th Cir. 1944, 146 F. 2d 341.

CONCLUSION

It is respectfully urged that the judgments of the District Court and the Court of Appeals be reversed.

Respectfully submitted,

JOSEPH M. COHEN,
Attorney for Petitioner, Zittman.

APPENDIX

1. Joint Resolution of May 7, 1940, 54 Stat. 179.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (b) of section 5 of the Act of October 6, 1917 (40 Stat. 411), as amended, is hereby amended to read as follows:

"During time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by or to banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, and any transfer, withdrawal or exportation of, or dealing in, any evidences of indebtedness or evidences of ownership of property in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest, by any person within the United States or any place subject to the jurisdiction thereof; and the President may require any person to furnish under oath, complete information relative to any transaction referred to in this subdivision or to any property in which any such foreign state, national or political subdivision has any interest, including the production of any books of account, contracts, letters, or other papers, in connection therewith in the custody or control of such person, either before or after such transaction is completed."

SEC. 2. Executive Order Numbered 8389 of April 10, 1940, and the regulations and general rulings issued thereunder by the Secretary of the Treasury are hereby approved and confirmed.

.

2. Executive Order No. 8339, April 10, 1940, 5 F. R. 1400, as amended by Executive Order No. 8785, June 14, 1941, 6 F. R. 2897.

SECTION 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarking of gold or silver coin or bullion or currency by any person within the United States;

E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

.

3. General Ruling No. 12, April 21, 1942, 7 F. R. 2991.

(1) Unless licensed or otherwise authorized by the Secretary of the Treasury (a) any transfer after the effective date of the Order [Exec. Order No. 8389] is null and void to the extent that it is (or was) a transfer of any property in a blocked account at the time of such transfer; and (b) no transfer after the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account (irrespective of whether such property was in a blocked account at the time of such transfer).

* * * * *

(3) Unless otherwise provided an appropriate license or other authorization issued by the Secretary of the Treasury before, during, or after a transfer shall validate such transfer or render it enforceable to the same extent as it would be valid or enforceable but for the provisions of section 5(b) of the Trading with the Enemy Act, as amended, and Order, regulations, instructions and rulings issued thereunder.

(4) Any transfer affected by the Order and/or this general ruling and involved in, or arising out of, any action or proceeding in any Court within the United States shall, so far as affected by the Order and/or this general ruling, be valid and enforceable for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated: *Provided, however,* That no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license.

* * * * *

4. New York Judiciary Law.

§ 750. Power of courts to punish for criminal contempts.

A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:

3. Wilful disobedience to its lawful mandate.

§ 753. Power of courts to punish for civil contempts.

A. A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases:

3. A party to the action or special proceeding, an attorney, counsellor, or other person, for the non-payment of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution cannot be awarded for the collection of such sum; or for any other disobedience to a lawful mandate of the court.

8. In any other case, where an attachment or any other proceeding to punish for a contempt, has been usually adopted and practiced in a court of record, to enforce a civil remedy of a party to an action or special proceeding in that court, or to protect the right of a party.

5. New York Civil Practice Act.

§ 520. Judgment against non-resident enforceable only against attached property.

Where a defendant who has not appeared is a non-resident of the state, or a foreign corporation, and the summons was served without the state, or by publication pursuant to an order obtained for that purpose, the judgment can be enforced only against the property which has been levied upon by virtue of a warrant of attachment at the time when the judgment is entered. But this section does not declare the effect of such a judgment with respect to the application of any statute of limitation.

§ 645. Requisites of execution where warrant of attachment levied.

Where a warrant of attachment issued in the action has been levied by the sheriff, the execution must substantially require the sheriff to satisfy the judgment as follows:

1. Where the judgment debtor is a non-resident, or a foreign corporation, and the summons was served upon him or it, without the state, or otherwise than personally, pursuant to an order obtained for that purpose, and the judgment debtor has not appeared in the action; out of the personal property attached, and, if that is insufficient, out of the real property attached.

§ 916. The attachment may also be levied upon:

3. A debt, arising under or on account of a contract, not represented by a bond, promissory note or other instrument for the payment thereof, negotiable or otherwise, whether or not the said debt is past due, or yet to become due, to a resident or non-resident person or corporation, from a resident or non-resident person or corporation, upon whom or which service of process may be had within the county, provided that an action could be maintained by the defendant within the state for the recovery of such debt at the maturity thereof or where the debt consists of a deposit of money not to be repaid at a fixed time but only upon a special demand, that such demand therefor could be duly made by defendant within the state. The levy of the attachment thereon is deemed a levy upon, and a seizure of all the rights of the defendant in or to the said debt.

§ 917. A levy under a warrant of attachment must be made as follows:

2. Upon other property subject to attachment, as follows: Where the property consists of a demand, other than as hereinafter specified, by leaving a certified copy of the warrant with the person against whom it exists; * * *

A levy made by service of a certified copy of a warrant of attachment shall apply to any and all property of the defendant or debt owing to him, or to any interest of the defendant therein or thereto, subject to attachment, held or owed by the person on whom it is served, except that the levy shall not apply to such property, debt or interest, if the said person has no knowledge or reason to believe that the said property or debt belongs, or is owing, to the defendant, or is claimed by him or on his behalf, or that he has, or claims to have, an interest therein, unless such property, debt, or interest therein shall be specified in a writing accompanying the certified copy of the warrant.

Any such person so served with a certified copy of a warrant of attachment is forbidden to make or suffer, any transfer or other disposition of, or interfere with, any such property or interest therein so levied upon, or pay over or otherwise dispose of any debt so levied upon, or sell, assign or transfer any right so levied upon, to any person, or persons, other than the sheriff serving the said warrant until ninety days from the date of such service, except upon direction of the sheriff or pursuant to an order of the court. Any such payment, sale, assignment or transfer shall nevertheless be valid as to the payee or transferee in good faith thereof, and without notice that the warrant has been served.

§ 922. Actions and special proceedings by sheriff.

1. In the event that the person owing any debt to the defendant, or holding property, effects or things in action of the defendant or interest therein subject to attachment, on which a levy under a warrant has been made, as in this act provided, shall fail or refuse to deliver such personal property attached, or to pay or assign to the sheriff the said debt, effect or thing in action, or interest therein, the sheriff may, and if indemnified by the plaintiff as hereinafter provided, must, within ninety days after the service of the certified copy of the warrant on such person, commence an action or special proceeding to reduce to his actual custody all such personal property capable of manual

delivery, and to collect, receive and enforce all debts, effects and things in action attached by him, and may maintain any such action or special proceeding in his name or in the name of the defendant for that purpose. He may discontinue such an action or special proceeding at such time and on such terms as the court or judge directs. * * *

The service of process commencing such action or special proceeding against any person upon whom a certified copy of a warrant of attachment shall have been served, shall continue as against that person during the pendency of said action or special proceeding all duties and liabilities imposed upon him in the first instance by the service of the said warrant of attachment upon him.

The time within which such action or special proceeding, as hereinbefore provided, may be commenced shall be extended beyond the period of ninety days from the date of the service of the said warrant only by order of the court for good cause shown. Such an order may be granted upon ex parte application of plaintiff. An order thus extending the time within which such an action or special proceeding may be commenced shall be effective to continue all duties and liabilities of any person on whom a warrant of attachment in the action has been served, provided that a certified copy of the said order is served upon said person prior to the expiration of the said ninety days or prior to the expiration of the time for commencing such an action or special proceeding as further extended.

§ 948. The defendant, or the person upon whom a warrant of attachment has been served, or a person who has acquired a lien upon or interest in his property after it was attached, may apply, at any time before the actual application of the attached property or the proceeds thereof to the payment of a judgment recovered in the action, to vacate or modify the warrant, or to increase the security given by the plaintiff, or for one or more of those forms of relief, together or in the alternative.

§ 969. Satisfaction of judgment from attached property.

Where an execution against property is issued upon a judgment for the plaintiff in an action in which a warrant of attachment has been levied, the sheriff must satisfy it as follows:

1. He must pay over to the plaintiff all money attached by him, and the proceeds of all sales of perishable property, or of any vessel or share or interest therein, or animals, sold by him, or of any debts, or other things in action collected or sold by him; or so much thereof as is necessary to satisfy the judgment.

4. Until the judgment is paid, he may collect the debts and other things in action attached, and prosecute any undertaking, which he has taken in the course of the proceedings, and apply the proceeds thereof to the payment of the judgment.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 298

LEO ZITTMAN (with whom The Chase National Bank of the
City of New York was impleaded below),

Petitioner,

v.

J. HOWARD McGRATH, Attorney General, as Successor to
the Alien Property Custodian,

Respondent.

No. 299

LEO ZITTMAN (with whom the Federal Reserve Bank of
New York was impleaded below),

Petitioner,

v.

J. HOWARD McGRATH, Attorney General, as Successor to
the Alien Property Custodian,

Respondent.

REPLY BRIEF FOR PETITIONER ZITTMAN

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ARGUMENT

I

Respondent's position below—reiterated here—is that an unlicensed transaction in frozen funds cannot furnish “the basis for the assertion or recognition of *any* interest or right in any blocked property” (Resp. Br. below, p. 23). The *Singer* and *Mellie Iran* cases, by holding precisely to the contrary, have made this position untenable. Both *Singer* and *Mellie Iran* asserted such rights. And this Court has recognized them. Today, *Singer* and *Banque Mellie Iran*—by the mandate of this Court—hold valid rights *in rem* against frozen Japanese funds vested by the Custodian—rights which rest solely upon a prohibited and unlicensed transaction in frozen funds. By reiterating his stand here—a stand rejected by this Court in *Singer* and *Mellie Iran*—respondent, in reality, asks this Court to reverse its holdings in those cases.

Respondent's brief overlooks, we believe, the decisive question in this case. The question is simply this: Since, in *Lyon v. Singer* and *Lyon v. Banque Mellie Iran*, 339 U. S. 841, the Custodian must take the vested Japanese assets subject to the *unlicensed* claims of *Singer* and *Mellie Iran*, payable when licensed, must not petitioner, Zittman's, *authorized* attachment be accorded, at least, the same standing?

Everything said here by respondent against Zittman's claim—and more—can be said against the claims of *Singer* and *Mellie Iran*. Thus, the latter “sought to realize on the local assets of enemy nationals”. Both asserted that “New York's judicial process had given them an interest [*in rem* under *Ticónic National Bank v. Sprague*, 303 U. S. 406] in the property itself” as against the Custodian's licensee, the New York Superintendent of Banks. Both claims rested upon process “issued after the freeze date and without a federal license” (Resp. Br., pp. 12-13). Both

claimants asserted causes of action which arose *after* the inception of freezing controls and out of unlicensed transactions in frozen funds—whereas Zittman's cause of action arose in 1937 (IR 198), before the controls were inaugurated.¹ Nonetheless, this Court sustained the Singer and Mellie Iran claims.

Moreover, certiorari was asked in *Singer* and *Mellie Iran* because of an alleged conflict with *Propper v. Clark*, 337 U. S. 472. Every argument made here by respondent was pressed in *Singer* and *Mellie Iran*—both by respondent as *amicus curiae*, and by Lyon, as respondent's licensee. Every one of these arguments was rejected by this Court in the *Singer* and *Mellie Iran* cases, when it sanctioned the view of the New York Court of Appeals that an *in rem* claim against frozen funds could be established by litigation so long as payment of the judgment were screened by license—a view first espoused in the *Polish Relief* case and consistently followed by the New York courts since.

Respondent, reiterating his argument in *Singer* and *Mellie Iran*, says that the objectives of freezing are impaired if petitioner's attachment, though authorized, is permitted to reach the frozen funds of the German banks.² The freezing controls, he asserts, were intended to preserve blocked property (a) for possible future vesting if needed for prosecution of the threatened war or to compensate our citizens or ourselves for the damage done by the Gov-

¹ Since the transaction which underlay Zittman's attachment took place in 1937 (IR 198) it was not subject to the freezing controls which, as to Germany, became effective June 14, 1941 (Exec. Ord. 8785, 6 F. R. 2897). This is in sharp contrast to the *Singer* and *Mellie Iran* claims which both arose and were sued on after the freeze date.

² Respondent's argument (Br. pp. 15-16) that the objectives of the controls made it necessary to proscribe attachments to avoid collusive transfers as the result of default judgments, deliberately acquiesced in, is a *non-sequitur*. The judgment—whether contested or on default—could not be satisfied until the payment were screened by license.

ernments of the nationals affected;³ and (b) so that it might be distributed ratably among all United States citizens having claims against blocked nationals (Resp. Br., p. 16, 18-19). If these be the true objectives of the freezing controls, respondent has flouted them over and over again. If property was frozen for the purposes suggested, why have the Secretary of the Treasury and respondent repeatedly licensed the payment of frozen funds—of alien friend and enemy alike—to satisfy the claims of private American citizens (IR 266-269), thus preferring the claims of some over others? Why did respondent license payment of the claim of Banque Mellie Iran, even while it was pending on appeal to this Court? Respondent's actions—as distinguished from his words—demonstrate that, in practice, he has treated the controls as a screening process, purely and simply—and not as a means of achieving the ends for which he argues here.

Neither General Ruling No. 12, nor Press Release No. 34, nor Public Circular No. 31, nor the alleged authority of *Propper v. Clark*, nor the objectives of the freezing controls, as conceived by respondent, were permitted to defeat the claims of Singer and Banque Mellie Iran in this Court. There is no valid reason why petitioner, Zittman's, claim must be treated differently from those of Singer and Banque Mellie Iran. None has been suggested by respondent.

³ The Joint Resolution creating the controls cannot be said to have been an aid to vesting for these stated purposes. It was passed in peacetime when (a) there was no vesting power, (b) we were not at war and (c) there were no "enemy nationals". Moreover, even in war time we have never sanctioned, under our Constitution, the confiscation of property of alien friends—though they may technically be regarded as within the definition of "enemy nationals"—irrespective of the treatment accorded elsewhere to property of our citizens. *Russian Volunteer Fleet v. U. S.*, 282 U. S. 481, 491-2; *Clark v. Uebersee Finanz-Korp.*, 332 U. S. 480; *Foreign Funds Control Through Presidential Freezing Orders*, 41 Col. L. Rev. 1039, 1044.

II

Respondent concedes that—because the *Chase* case, No. 298, involves only a “right, title and interest” vesting order—there is no issue here as to the “Custodian’s paramount power to vest” (Resp. Br., p. 21). This concession at once distinguishes the instant case from *Propper v. Clark*, 337 U. S. 472. The latter—so this Court has said in *Lyon v. Singer*, 339 U. S. 841, 842—turned upon the fact that Propper “claimed title to frozen assets” against the “Custodian’s paramount power to vest”.⁴

To check the force of this concession, respondent questions this Court’s appraisal of the *Propper* case. Contrary to this Court’s view, respondent asserts that the *Propper* case, too, involved only a “right, title and interest” vesting order and not the paramount power of the Custodian to vest (Resp. Br., p. 21). If it be true—as respondent intimates—that this Court misunderstood the *Propper* case, this is but a further reason, we submit, why the *Propper* case should not be followed here.

Respondent acknowledges that the *Propper* case dealt with an unlicensed transfer of title in contrast to the instant case, which deals only with a lien premised upon an authorized attachment (Resp. Br., p. 14). He says the distinction is “without substance”; that the *Propper* case is all-inclusive and interdicts both. We are of a different opinion.

In our view, in limiting the *Propper* holding to transfers of title, this Court made a deliberate choice. It was fully aware of the fact that the freezing controls “did not pro-

⁴ Respondent asserts that petitioners have no right “to resist the claim of the Custodian to take property that was admittedly enemy-owned on June 14, 1941” (Br. p. 17). The assertion overlooks two important points. First, the property was not enemy-owned on June 14, 1941—we were not then at war. Second, the Custodian is bound, under the Fifth Amendment, to respect the rights of others in the vested property. *Miller v. Kalivcher*, 283 Fed. 746, 757-758; *Commercial T. Co. v. Miller*, 281 Fed. 804, 806, aff’d 262 U. S. 51; *Becker Steel Co. v. Cummings*, 296 U. S. 74, 79.

hibit all transactions without license" involving frozen property. 337 U. S. 472, 480. This Court concluded that the Joint Resolution effected "a valid plan for control of the property covered by the regulation that prohibited any change of *title* to that property". And this Court expressly premised its "determination on the purpose of Congress to prevent shifts in *title* to blocked assets". 337 U. S. 472, 486. It must be assumed that these explicit and repeated references in *Propper* to transfer of title—used by this Court in expressing its "conclusion" and the basis of its "determination"—were a deliberate, not a casual, choice.

That this Court limited the *Propper* holding to transfers of title is emphasized by its express refusal to decide "whether every determination of rights concerning blocked property in unlicensed litigation is voidable." 337 U. S. 472, 486. By limiting its holding to transfers of title and reserving its freedom to pass upon other litigation involving frozen funds, this Court left itself free to review, independently of *Propper*, the issues which are common to the instant case and the *Singer* and *Mellie Iran* cases.

The *Propper* case is no more dispositive here than it was in *Singer* and *Mellie Iran*.

III

Respondent asserts that the Treasury's position, as expounded by him here, was accepted in the *Polish Relief* case. We believe that the Respondent has misapprehended the holding.

The Treasury, as we understand it, presented two main points to the New York Court of Appeals. *First*, it urged that the Secretary had authorized the bringing of an attachment action (Treasury Br. p. 39); *second*, that the attachment created a "contingent interest" which was "null and void unless authorized by the Secretary". (Treasury Br., p. 52)

As to the *first*, the Treasury and the New York Court of Appeals were in agreement that an attachment action was

permitted—though their conclusions rested on different premises. The Treasury view was that the right to attach existed by reason of Treasury authority. The New York Court of Appeals took the view that the “Executive Order did not forbid attachment * * *” (288 N. Y. 332, 338).⁵

As to the *second*, the New York Court of Appeals flatly rejected the Treasury position that the attachment effected only a contingent interest, saying at page 338, “* * * These actual liabilities [the attached bank accounts] were not transmuted into contingent obligations merely because the Executive Order had adventitiously put a stay upon them.”⁶

There can be no doubt as to the holding in the *Polish Relief* case when this case is considered together with *Feuchtwanger v. Central Hanover Bank & T. Co.*, 288 N. Y. 342, decided the same day. In the *Feuchtwanger* case the New York Court of Appeals held that the courts of New York could—without Treasury license—take jurisdiction of frozen funds in an *in rem* proceeding and declare the frozen funds to be impressed with a trust in plaintiff’s

⁵ Respondent errs in assuming that attachments of frozen funds fall within the ban of Sec. 1E of Exec. Order 8389 (Resp. Br. pp. 10-11). The evidence—including the Treasury’s own explanation of Sec. 1E—is overwhelming that Sec. 1E was directed only against the transfer of *stocks and bonds*. U. S. Treasury Dept., *Administration of the Wartime Financial and Property Controls of the United States Government* (1942), pp. 20-1; *U. S. v. Leiner*, 2nd Cir., 143 F. (2d) 298, 300; brief for U. S., *amicus curiae*, p. 16, in the *Polish Relief* case; H. Rep. No. 2009, 76th Cong., 3d Sess., 1940; S. Rep. 1946, 76th Cong., 3d Sess., 1940; Senator Wagner in 86 Cong. Rec. 5006.

⁶ Upon analysis, it would appear that the Treasury’s view was rejected by both the majority and the minority in the *Polish Relief* case. The majority did so because they found that the freezing controls permitted a valid—not a “conditionally null and void”—seizure by attachment of the frozen funds and so met the dictates of *Pennoyer v. Neff*. The minority found, in effect, that the attachment of frozen funds did not effect a seizure within the requirement of *Pennoyer v. Neff*. This was a repudiation of the Treasury view that a seizure, which was “conditionally null and void”, would sustain a valid attachment.

favor, limiting the need for a license to the point at which title to the funds was to be transferred from an account in the name of defendant to one in plaintiff's name. When the *Polish Relief* and *Feuchtwanger*⁷ cases are read together, it is clear that the New York Court of Appeals held precisely as Respondent has stipulated here, viz., that the freezing controls did not limit an attachment and that only payment of the ensuing judgment was to be screened by Treasury license.

IV

Respondent's brief in the Court of Appeals (pp. 25-26) contains the following statements:

"* * * Appellants stress throughout their briefs that a license was not required to institute a suit by attachment. Appellee concedes this and has so stipulated (266). What appellants persistently ignore, however, is that the attachment could not actually reach the blocked property unless and until a license was obtained. * * *"

This statement frames respondent's position throughout this litigation.

To say, as respondent does, that an attachment was permitted but that it "could not actually reach the blocked property" until a post-judgment license issued is to state a legal absurdity. If the process "actually reach[es] the blocked property" there is an attachment; otherwise there is none. An attachment is simply a process for actually reaching property at the commencement of an action, in order that it may be brought under the control of the court

⁷ The concurring opinion in the *Feuchtwanger* case notes that the parties did not argue the force of Exec. Order 8389. The holding of the majority, however, must be taken to have considered the effect of the Executive Order. Had the Order forbidden what the judgment in the case undertook to do, the N. Y. Court of Appeals would have been under a duty to have noticed the question on its own motion. *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261.

and dealt with—consistently with the 14th Amendment—by the ensuing judgment. *Pennoyer v. Neff*, 95 U. S. 714.

Respondent does not meet the issue by arguing that in some states, e.g. Wisconsin, the state law permits the court to reach the property by means other than attachment. We are dealing here (a) with the laws of New York which specify that the means *shall* be attachment and (b) with the Treasury's specific ruling that this means is permissible under the freezing controls.

Nor would respondent's argument fare better in a state which permits *in rem* seizures by means other than attachment. Whatever the means, it must bring the property under the control of the court—i.e. "actually reach" it before judgment—in order to satisfy the dictates of the 14th Amendment as expounded in *Pennoyer v. Neff*, *supra*. Respondent's view that, under the freezing controls, the property may not be brought under the court's control before judgment, would proscribe not only attachment but also every other method for securing *in rem* jurisdiction consistently with the dictates of *Pennoyer*. Not even respondent would contend for such a result under the plain stipulation of fact in this case.

Conclusion

The New York State Court of Appeals and the Second Federal Circuit are in irreconcilable conflict as to the force of the freezing controls. The view of the New York State Court has the sanction of this Court's holding in the *Singer* and *Mellie Iran* cases. The Second Circuit finds sanction for its view in this Court's earlier holding in *Propper v. Clark*. We believe sincerely—as do many others at the Bar—that there can be no real guide for the solution of freezing control problems until the conflict of views between these two courts of co-ordinate jurisdiction

is resolved. Surely the rights of litigants should not hang upon the fortuitous circumstance of whether their cases are processed in one court as against the other.

It is earnestly urged that certiorari be granted.

Respectfully submitted,

JOSEPH M. COHEN,
Attorney for Petitioner Zittman.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 298

LEO ZITTMAN (with whom The Chase National Bank of the
City of New York was impleaded below),
Petitioner,

v.

J. HOWARD McGRATH, Attorney General, as Successor to
the Alien Property Custodian,
Respondent.

No. 299

LEO ZITTMAN (with whom the Federal Reserve Bank of
New York was impleaded below),
Petitioner,

v.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER ZITTMAN

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ARGUMENT

I

Respondent's position below—reiterated in substance
here—is that an unlicensed transaction in frozen funds

cannot furnish "the basis for the assertion or recognition of any interest or right in any blocked property" (Resp. Br. in the Court of Appeals, p. 23). The *Singer* and *Mellie Iran* cases, by holding precisely to the contrary, have made this position untenable. Both *Singer* and *Mellie Iran* asserted such rights. And this Court has recognized them. Today, *Singer* and *Banque Mellie Iran*—by the mandate of this Court—hold valid rights *in rem* against frozen Japanese funds vested by the Custodian—rights which rest solely upon a proscribed and unlicensed transaction in frozen funds. By reiterating his stand here—a stand rejected by this Court in *Singer* and *Mellie Iran*—respondent, in reality, asks this Court to reverse its holdings in those cases.

Respondent's brief overlooks, we believe, the decisive question in this case. The question is simply this: Since, in *Lyon v. Singer* and *Lyon v. Banque Mellie Iran*, 339 U. S. 841, the Custodian must take the vested Japanese assets subject to the unlicensed claims of *Singer* and *Mellie Iran*, payable when licensed, must not petitioner's authorized attachment be accorded, at least, the same standing?

Everything said here by respondent against petitioner's claim—and more—can be said against the claims of *Singer* and *Mellie Iran*. Thus, the latter "sought to realize on the local assets of enemy nationals". Both contended that "New York's judicial process had given them an interest [in *rem* under *Ticonic National Bank v. Sprague*, 303 U. S. 406] in the property itself" as against the Custodian's licensee, the New York Superintendent of Banks. Both claims rested upon process "issued after the freeze date and without a federal license" (Resp. Br. p. 15). Both claimants asserted causes of action which arose after the inception of freezing controls and out of unlicensed transactions in frozen funds—whereas Zittman's cause of action arose in 1937, before the controls were inaugurated. Nonetheless, this Court sustained the *Singer* and *Mellie Iran* claims.

The arguments made here by respondent were pressed in *Singer* and *Mellie Iran*—both by respondent as *amicus curiae* and by Lyon as respondent's licensee. These arguments were rejected by this Court in the *Singer* and *Mellie Iran* cases, when it sanctioned the view of the New York Court of Appeals that an *in rem* claim against frozen funds, can be established by litigation so long as payment of the judgment is screened by license—a view first espoused in the *Polish Relief* case and consistently followed by the New York Courts since.

Neither General Ruling No. 12, nor Press Release No. 34, nor Public Circular No. 31 nor the alleged authority of *Propper v. Clark*, nor the objectives of the freezing controls, as conceived by respondent, were permitted to defeat the claims of *Singer* and *Banque Mellie Iran* in this Court. There is no valid reason why the claim of petitioner, Zittman, must be treated differently from those of *Singer* and *Banque Mellie Iran*. None has been suggested by respondent.

II

Respondent concedes that the Executive Order did not cover the attachment of frozen funds. He says (Br. p. 49):

"Respondent does not contend that the attachments were absolutely void or that they were illegal. He agrees that freezing did not purport to prohibit the resort to judicial process. He states simply that transfers in blocked property were proscribed and that the judicial hand was stayed to that extent. **Not attachments, but transfers, were controlled.**"¹ (Emphasis supplied.)

¹ For the first time in this litigation, respondent concedes here that an attachment of frozen funds impresses a "lien" upon them, though he would regard the lien as "contingent" rather than "fixed" (Br. p. 49). This is a complete reversal of his position in the Court of Appeals where he argued that the "acquisition of a lien" was banned (Resp. Br. in the Court of Appeals, pp. 15-16).

It seems to us that this concession is decisive of the case. If, as is conceded, petitioner's attachment was not controlled, the rights created by his levy are to be found in the law of New York—not in the freezing controls. Under New York law, petitioner acquired in the attached accounts "a fixed and present lien which will have recognition and enforcement everywhere." (Cardozo, J. in *Sanders v. Armour Fertilizer Works*, 292 U. S. 190, 208, citing *Embree v. Hanna* [N. Y.] 5 Johns, 101; see cases cited in our main brief, page 32, footnote 29). It is petitioner's position that he is entitled to claim that lien.

To defeat petitioner's claim, respondent must show that the New York law is otherwise. He does not satisfy that burden by arguing (Br. pp. 46, 47) that Illinois and California accord the attaching creditor only an "inchoate" or "contingent" lien.² Petitioner attached in New York where it is clear—and undisputed—that his lien is "fixed and present".

Nor is it relevant that in some states, e.g. Wisconsin, *in rem* jurisdiction may be secured by means other than, or in addition to,³ attachment (Resp. Br. pp. 44-46). Here, the means employed by petitioner was attachment. It suffices that this means—as respondent admits—was permitted by the freezing controls.

It adds nothing to speculate, as does respondent, on what would have been petitioner's rights had he attached elsewhere than in New York or had he resorted to processes other than attachment to achieve *in rem* jurisdiction.

² Had petitioner attached in Illinois or California, his "inchoate" attachment lien would have become fixed when he recovered judgment on March 27, 1942 (R. 50)—some four and one half years before respondent vested (R. 6). Therefore, even under the law of those states petitioner would have a perfected lien antecedent to the Custodian's vesting.

³ It is true as respondent claims (Br. p. 45) that, under Sec. 232(6) of the New York Civil Practice Act, an *in rem* action may be maintained—without attachment—in equity actions brought to exclude the defendant from an interest in specific property. However, that section was not available to petitioner who sued the German banks at law to recover a money judgment.

III

Respondent contends that petitioner must be defeated if the objectives of freezing are to prevail.⁴ The argument is that the controls were intended not only to protect local property against Axis conquest but to immobilize the frozen property for vesting so that it could be utilized by our Government in prosecuting the war⁵ (Br. pp. 19-20) and for possible distribution among American claimants (Br. p. 21). To permit petitioner to prevail, it is said, would defeat, *pro tanto*, this vesting purpose.

Respondent's view assumes that, in enacting the Joint Resolution on May 7, 1940—some nineteen months before war came—Congress set up the freezing controls as an aid to confiscation by vesting. The assumption is untenable.

The controls did not purport to confiscate or appropriate the controlled property. They did not purport to immobilize property for later vesting under the Trading With the Enemy Act. Since we were not then at war, there was no power to vest. There could be no purpose to freeze property in support of the power to vest—which did not then exist—in order to facilitate the prosecution of a war—in which we were not then engaged. No such purpose can be found in the Congressional materials. In

⁴ It is important to note that the objectives pertinent here are those which underlay the Joint Resolution, 54 Stat. 179. The First War Powers Act (55 Stat. 839), passed on December 18, 1941—after Zittman had attached—furnishes no guide for ascertaining the aims of the freezing controls prior to its enactment. Like General Ruling 12, the First War Powers Act had criminal sanctions and, so, could not be given retroactive force. See our main brief, page 36.

⁵ Respondent's own office has disavowed this purpose. Thus, Robert M. Vote of the Estates and Trusts Branch of the Office of Alien Property says the following in his work *Alien Property Litigation in World War II* (1949) at page A-2: " * * * Freezing controls could not avoid the dereliction or destruction of enemy-owned property. Nor did freezing controls afford a means by which this Government could acquire the property and use it for its own war effort. * * * "

truth, on May 7, 1940, Congress had no concern with who should own the frozen funds or credits ultimately so long as they were kept from the Axis.

The controls of the Joint Resolution applied to the property of all the designated nationals. All were alien friends, since we were not at war with any. Some were alien friends—laboring under the Axis yoke—with whom we were not only friendly but to whom we were openly sympathetic. It is unthinkable that Congress would attempt by the Joint Resolution to freeze, for future confiscation by vesting, the property of France, Norway, Denmark, China and others of our alien friends. The Congressional materials disclose only the purpose to protect—not confiscate—such property.^{5a} Construed as a measure to facilitate confiscation, the Joint Resolution would be a complete reversal of our traditional policy toward the property of alien friends; it would, indeed, be patently unconstitutional under the Fifth Amendment. *Becker Steel Co. v. Cummings*, 296 U. S. 74, 79, 81; *Russian Volunteer Fleet v. U. S.*, 282 U. S. 481, 489, 491.

To regard the controls of the Joint Resolution as a mere adjunct to respondent's vesting power would, of course, permit the respondent to confiscate more property. But nothing said by Congress in the Joint Resolution of May 7, 1940, permits this view of freezing. The scope and purpose of the Resolution cannot be enlarged merely to facilitate the Attorney General's confiscatory aims. *Ex parte Endo*, 323 U. S. 283.

Respondent says that the Joint Resolution should be regarded as confiscatory in purpose so that respondent may have more funds to expend under certain post-war statutes. This Court should strike down petitioner's attachment, he says, because this would increase the fund to

^{5a} The Treasury expressed the purpose thus: "At its inception, Foreign Funds Control had as its primary purpose the protection of the assets within the United States of invaded countries in order to prevent their falling into the hands of the invaders and in order to protect American institutions from possible adverse claims." U. S. Treasury Dept., *Administration of the Wartime Financial And Property Controls of the United States Government* (1942), p. 3.

be administered by respondent under a 1946 amendment to the Trading With the Enemy Act; would swell the fund created by the War Claims Act of 1948; and would augment this country's share of reparations under the 1946 Paris Agreement on Reparations (Resp. Br. pp. 19-24).

To be sure, petitioner's defeat here would serve the convenience and profit of the Government under these post-war enactments. But these are not the criteria by which the courts of our land measure the validity of private rights. To defeat petitioner's rights here respondent must show that Congress intended that the 1940 Joint Resolution should be confiscatory in purpose. He does not make that showing by arguing that—due to post-war enactments—the Government will have more money to spend if the Joint Resolution be construed as confiscatory. The objectives of the Joint Resolution cannot be changed as one would change the oil in his automobile. We cannot drain out of the Joint Resolution its 1940 purpose to protect local assets against Axis conquest and pour into it the purpose to confiscate in aid of post-war ends.

If, as respondent says, the true aims of freezing were ultimate confiscation of frozen funds for the profit of the Government and for ratable distribution among American claimants, both the respondent and the Treasury have flouted those aims over and over again. Both have licensed the payment of frozen funds—of alien friend and enemy alike—to satisfy the claims of citizens (R. 66-67). In fact, respondent licensed payment of the claim of Banque Mellie Iran—an alien—out of frozen Japanese funds even while the claim was pending before this Court.

If the aims of freezing are correctly stated by respondent, by what right did he license these claims and, thus, prefer them above the claims of others and, indeed, above the alleged interest of the Government itself? Should not the licensed funds have been kept intact for confiscation by the Government as reparations and for expenditure under the War Claims Act?

Respondent's actions, it seems, belie his words. In action, respondent—like his predecessor the Secretary of

the Treasury—treated the controls as a screening process purely and simply. He cannot, with good grace, ask this Court to treat them otherwise.

I V

Respondent concedes that—because the *Chase* case, No. 298, involves only a “right, title and interest” vesting order—there is no issue here as to the “Custodian’s paramount power to vest” (Resp. Br. p. 27). This concession at once distinguishes the instant case from *Propper v. Clark*, 337 U. S. 472. The latter—so this Court has said in *Lyon v. Singer*, 339 U. S. 841, 842—turned upon the fact that Propper “claimed title to frozen assets” against the “Custodian’s paramount power to vest”.⁶

To check the force of this concession, respondent questions this Court’s appraisal of the *Propper* case. Contrary to this Court’s view, respondent asserts that the *Propper* case, too, involved only a “right, title and interest” vesting order and not the paramount power of the Custodian to vest (Resp. Br. p. 27). If it be true—as respondent intimates—that this Court misunderstood the *Propper* case, this is but a further reason, we submit, why the *Propper* case should not be followed here.

Respondent acknowledges that the *Propper* case dealt with an unlicensed transfer of title in contrast to the instant case, which deals only with a lien premised upon an authorized attachment. He says the distinction is “without substance”; that the *Propper* case is all inclusive and inter-

⁶ Respondent asserts here that the attached German bank accounts were enemy property on the freeze date, June 14, 1941 and that the Custodian’s vesting orders of October 1946 (R. 9, 14) reaches them retroactively (Resp. Br. pp. 26-27). The contention is patently unsound for at least two reasons. *First*, we were not at war June 14, 1941. Therefore, (a) the bank accounts were not enemy owned and (b) there was no Custodian and no vesting power. *Second*, under the Fifth Amendment, the Custodian’s vesting is subordinate to the prior rights of others in the vested property. *Miller v. Kaliwerke*, 283 Fed. 746, 757-758; *Commercial T. Co. v. Miller*, 281 Fed. 804, 806, aff’d 262 U. S. 51; *Becker Steel Co. v. Cummings*, 296 U. S. 74, 79.

dicts both (Resp. Br. pp. 16-17, 20): We are of a different opinion.

In our view, in limiting the *Propper* holding to transfers of title, this Court made a deliberate choice. It was fully aware of the fact that the freezing controls "did not prohibit all transactions without license" involving frozen property. 337 U. S. 472, 480. This Court concluded that the Joint Resolution effected "a valid plan for control of the property covered by the regulation that prohibited any change of *title* to that property". And this Court expressly premised its "determination on the purpose of Congress to prevent shifts in *title* to blocked assets". 337 U. S. 472, 486. It must be assumed that these explicit and repeated references in *Propper* to transfer of title—used by this Court in expressing its "conclusion" and the basis of its "determination"—were a deliberate, not a casual, choice.

That this Court limited the *Propper* holding to transfers of title is emphasized by its express refusal to decide "whether every determination of rights concerning blocked property in unlicensed litigation is voidable." 337 U. S. 472, 486.

The *Propper* case is no more dispositive here than it was in *Singer* and *Mellie Iran*.

V

Respondent asserts that the Treasury's position, as expounded by him here, was accepted in the *Polish Relief* case (Br. p. 42). We believe that the respondent has misapprehended the holding.

The Treasury, as we understand it, presented two main points to the New York Court of Appeals. *First*, it urged that the Secretary had authorized the bringing of an attachment action (Treasury Br. p. 39). *second*, that the attachment created a "contingent interest" which was "null and void unless authorized by the Secretary". (Treasury Br. p. 52.)

As to the *first*, the Treasury and the New York Court of Appeals were in agreement that an attachment action

was permitted—though their conclusions rested on different premises. The Treasury view was that the right to attach existed by reason of Treasury authority. The New York Court of Appeals took the view that the “Executive Order did not forbid attachment . . .” (288 N. Y. 332, 338).

As to the *second*, the New York Court of Appeals flatly rejected the Treasury position that the attachment effected only a contingent interest, saying at page 338, “. . . These actual liabilities [the attached bank accounts] were not transmuted into contingent obligations merely because the Executive Order had adventitiously put a stay upon them.”⁷

There can be no doubt as to the holding in the *Polish Relief* case when this case is considered together with *Feuchtwanger v. Central Hanover Bank & T. Co.*, 288 N. Y. 342, decided the same day. In the *Feuchtwanger* case the New York Court of Appeals held that the courts of New York could—without Treasury license—take jurisdiction of frozen funds in an *in rem* proceeding and declare the frozen funds to be impressed with a trust in plaintiff's favor, limiting the need for a license to the point at which title to the funds was to be transferred from an account in the name of defendant to one in plaintiff's name. When the *Polish Relief* and *Feuchtwanger*⁸ cases are read to

⁷ Upon analysis, it would appear that the Treasury's view was rejected by both the majority and the minority in the *Polish Relief* case. The majority did so because they found that the freezing controls permitted a valid—not a “conditionally null and void”—seizure by attachment of the frozen funds and so met the dictates of *Pennoyer v. Neff*. The minority found, in effect, that the attachment of frozen funds did not effect a seizure within the requirement of *Pennoyer v. Neff*. This was a repudiation of the Treasury view that a seizure, which was “conditionally null and void”, would sustain a valid attachment.

⁸ The concurring opinion in the *Feuchtwanger* case notes that the parties did not argue the force of Exec. Order 8389. The holding of the majority, however, must be taken to have considered the effect of the Executive Order. Had the Order forbidden what the judgment in the case undertook to do, the N. Y. Court of Appeals would have been under a duty to have noticed the question on its own motion. *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261.

gether, it is clear that the New York Court of Appeals held precisely as respondent has stipulated here, viz., that the freezing controls did not limit an attachment and that only payment of the ensuing judgment was to be screened by Treasury license.

V I

Respondent contends (Br. p. 12) that attachments are controlled because they fall within Section 1E of the Executive Order.⁹ An attachment, he says, is a "transfer" or "dealing in" evidences of indebtedness or evidences of ownership of property within the scope of Section 1E. (This utterly contradicts his later statement [Br. p. 49] that "Not attachments, but transfers, are controlled.")

The contention is wholly without basis. An attachment is not a "transfer." (See our Main Br. p. 32.)¹⁰ Nor, indeed, is a bank account an "evidence of indebtedness" or an "evidence of ownership of property" within the meaning of Section 1E. The evidence is overwhelming that these phrases were incorporated into the Joint Resolu-

⁹ Respondent (Br. p. 12, note 8) also suggests that an attachment is a "transfer of credit between * * * banking institutions" and therefore is encompassed by Sec. 1A of Exec. Order 8389. The suggestion is without basis. The levy of Zittman's warrant of attachment impressed a lien upon the credit of the German banks with the Chase—not a transfer of the credit (Our Main Brief p. 32). There was no "transfer of credit" as this term has been defined by this Court. *Propper v. Clark*, 337 U. S. 472, 480. Moreover, the Sheriff levies the warrant as the officer of the state. *Stojozeski v. Banque de France*, 294 N. Y. 134, 145. The State of New York is not a "person" within the meaning of Executive Order 8389 (Sec. 5C) and, accordingly, is not a "banking institution" as defined in the Order, Sec. 5F. Cf. *U. S. v. United Mine Workers*, 330 U. S. 258, 275; *U. S. v. Cooper*, 312 U. S. 600, 604. Therefore, a transfer of the account—if one were involved—from the Chase to the Sheriff would not be one between "banking institutions."

¹⁰ General Ruling 12(5) defines "transfer" so as to include "attachment." The definition is not relevant here because petitioner attached long before the General Ruling was issued.

tion—and thereby into Section 1E—solely to bring stocks and bonds within the regulatory scheme.

Prior to enactment of the Joint Resolution, the Treasury had ruled that stocks and bonds were covered by the statute (Gen. Ruling No. 2; 5 F. R. 1474). Certain New York banks challenged the ruling. The phrases “evidences of indebtedness” and “evidences of ownership of property” were added by the Resolution to resolve ‘the doubt’¹¹ and to make explicit that which the Treasury had inferred—namely, that transfers of stocks and bonds were within the plan of the controls. This is inescapable from the following statement by the Treasury itself, at whose urging the Joint Resolution was adopted:

“1. Securities

“When the first Executive Order establishing the freezing control was issued on April 10, 1940, it was realized that if the Control was to be effective in preventing the assets of the invaded countries from falling into the hands of the invaders and being liquidated by them, a method must be found to prevent the looting and disposition of securities. Although the Order as issued contained no specific reference to securities, it was the purpose of this Government in issuing the Order to include the control of securities within its scope. Some question arose, however, at the outset, as to whether the Trading With the Enemy Act of the First World War, upon which the Order was based, gave authority for the extension of the Control to securities. The Treasury Department immediately clarified its position on this question by issuing General Ruling No. 2 and stating that the Control did extend to securities. *In order, however, to erase any doubt which might have existed, Congress immediately enacted supplementary legislation pur-*

¹¹ H. Rep. No. 2009, 76th Cong., 3d Sess., 1940; S. Rep. 1946, 76th Cong., 3d Sess., 1940; Senator Wagner in 86 Cong. Rec. 5006.

*suant to which the Order was amended so as clearly to include securities within the scope of the Control."*¹²

The plain fact is that the controls did not extend to suits or attachments. The Treasury recognized this limitation on its power when it acknowledged that attachments "were not forbidden" (R. 66).

Respondent insists that—despite what the Treasury said—this Court must find that the Treasury did not waive its control over attachments (Br. pp. 28-31). The question is not one of waiver. Rather, it is whether the Joint Resolution permitted the Treasury to control attachments. In ruling that under the freezing controls "no attempt is made to limit" suits or attachments, the Treasury merely acknowledged that the limits of its power under the Joint Resolution left it no other choice.

The Treasury did reserve the right to screen payments. In this, it was clearly within its rights under Sec. 1B of the Executive Order. Had the Treasury believed that Sec. 1E, or any other section of the Executive Order, empowered it to proscribe suits and attachments, it may be assumed, safely, that it would have reserved the authority to license these as well as payment of any judgment in the action.

VII

Respondent stands largely on General Ruling 12—though he fails to meet our point that it cannot be applied, retroactively, to petitioner's attachment. (See our Main Brief pp. 36-37.)

He says that Subdivision 4 of General Ruling 12—though it permits attachment of frozen funds—must be read, due

¹² U. S. Treasury Dept., *Administration of the Wartime Financial and Property Controls of the United States Government* (1942), pp. 20-1. See also *U. S. v. Leiner*, 2nd Cir., 143 F. 2d 298, 300; brief for United States, *amicus curiae*, p. 16, in the *Polish Relief* case.

to the proviso, as limiting the interest created by the attachment to such as the owner of the blocked account could confer by voluntary act. He assumes that the owner could confer nothing by his voluntary act and that, therefore, the proviso sterilizes the preceding grant of authority to attach.

The assumption is invalid. In *Lyon v. Singer*, the voluntary unlicensed act of a blocked national, Yokohama Specie Bank, was held to confer on Singer's assignor valid rights to the conveyed funds (299 N. Y. 791)—rights sanctioned by this Court as against the New York Superintendent of Banks acting for the Custodian.

If, as held in *Lyon v. Singer*, the voluntary act of a blocked national is effective to create valid rights, the proviso is meaningless; it does not detract from the authority to attach granted in the opening clause of Subdivision 4.

CONCLUSION

The judgments below should be reversed.

Respectfully submitted,

JOSEPH M. COHEN,
Attorney for Petitioner Zittman.

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In the Supreme Court of the United States

October Term, 1950

No. 298

LEO ZITTMAN (with whom The Chase National Bank of the City of New York was impleaded below), Petitioner,

v.

J. HOWARD McGRATH, Attorney General, as Successor to the Alien Property Custodian

No. 299

LEO ZITTMAN (with whom the Federal Reserve Bank of New York was impleaded below), Petitioner,

v.

J. HOWARD McGRATH, Attorney General, as Successor to the Alien Property Custodian

No. 314

JOHN F. McCARTHY (with whom The Chase National Bank of the City of New York was impleaded below), Petitioner,

v.

J. HOWARD McGRATH, Attorney General, as Successor to the Alien Property Custodian

No. 315

JOHN F. McCARTHY (with whom the Federal Reserve Bank of New York was impleaded below), Petitioner,

v.

J. HOWARD McGRATH, Attorney General, as Successor to the Alien Property Custodian

No. 324

JOHN J. McCLOSKEY, as Sheriff of the City of New York (with whom The Chase National Bank of the City of New York, Leo Zittman, and John F. McCarthy were impleaded below), and as Sheriff of the City of New York (with whom the Federal Reserve Bank of New York, Leo Zittman, and John F. McCarthy were impleaded below), Petitioner,

v.

J. HOWARD McGRATH, Attorney General, as Successor to the Alien Property Custodian

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Southern District of New York (I R 97-102)¹, is reported at 82 F. Supp. 740. The per curiam opinion of the Court of Appeals for the Second Circuit (II R 99-100) is reported at 182 F. 2d 349.

JURISDICTION

The judgments of the Court of Appeals were entered on June 2, 1950 (II R 100-101). Petitions for rehearing were filed on June 16, 1950 (II R 102-120), and denied on June 27, 1950 (II R 121-122). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

These proceedings were instituted by the respondent to obtain a declaration that he is entitled, under vesting orders issued by the Alien Property Custodian, to the entire balances remaining in certain bank accounts maintained by German nationals (the Deutsche Reichsbank and the Deutsche Golddiskontbank) with the Chase National Bank of New York and the Federal Reserve Bank of New York. Respondent also sought a declaration that federal foreign funds control or "freezing" regulations had prevented two attaching creditors, petitioners Leo Zittman and John F.

¹ Petitioners in these companion cases have filed the Record in two Parts. Part I is designated herein as I R and Part II as II R.

McCarthy, and petitioner John J. McCloskey, as Sheriff of the City of New York, from obtaining liens upon or other property interests in the accounts by means of writs of attachment obtained in the courts of New York subsequent to the freeze date. The following questions are presented:

1. Whether the court below erred in holding that, absent a license, no interest in blocked property could pass under a post-freezing attachment.

2. Whether the court below erred in holding that the Secretary of the Treasury did not in fact grant a general license authorizing the acquisition of interests in blocked property by means of attachments.

3. Whether the court below erred in holding that the federal court was a proper forum for determining respondent's rights.

STATUTES, EXECUTIVE ORDERS, AND REGULATIONS INVOLVED

The pertinent statutory provisions and orders and regulations issued thereunder are set forth in the Appendix, *infra*, pp. 40-73.

STATEMENT

The petitions before the Court arise out of two actions brought by the respondent, as successor to the Alien Property Custodian,² pursuant to Sec-

² By Executive Order No. 9788 (October 14, 1946, 11 F. R. 11981) the Attorney General succeeded to the powers and

tion 17 of the Trading With the Enemy Act and the Federal Declaratory Judgment Act. One action was brought against the Chase National Bank of the City of New York and petitioners Zittman, McCarthy and McCloskey (I R 3-30). The other was filed against the Federal Reserve Bank of New York and the same three petitioners (II R 3-30). The facts upon which the cases were submitted appear from the pleadings (I R 3-83; II R 3-72) as supplemented by stipulations between the parties (I R 84-96; II R 73-82).

By vesting orders executed in October 1946 the Custodian vested the obligations arising out of certain dollar accounts maintained by the Deutsche Reichsbank and the Deutsche Golddiskontbank with the Chase and Federal Reserve Banks in New York, including all rights to demand, enforce and collect the same^a (I R 13-15, 19-21; II R 12-14). The vesting order addressed to the obligation of the Federal Reserve Bank was implemented, the same month, by a turn-over directive which found that the principal amount of \$1,003,382.78 constituted "property that was vested * * * by the said vesting order" and demanded that this sum, together with all accumulations thereon, be surrendered

duties of the Alien Property Custodian. In this brief the terms "Alien Property Custodian" or "Custodian" will be used, as the context may require, to refer either to the Alien Property Custodian or the Attorney General as his successor.

^a The Custodian's vesting authority rests upon Section 5(b) of the Trading With the Enemy Act and Executive Order No. 9193 (July 6, 1942, 7 F. R. 5205).

forthwith to the Custodian (II R 20-22). No turn-over directive was addressed to Chase⁴ but the vesting orders pertaining to its obligations were served upon it with a demand for compliance (I R 16-18, 22-24).

Federal Reserve complied with the Custodian's turn-over directive to the extent of remitting \$703,382.78. It retained \$300,000 in its Reichsbank account, however, on the ground that it was required to do so by writs of attachment which had been served upon it (II R 25-30). Chase declined to surrender any of the property embraced by the Custodian's orders, asserting that it had been served with writs attaching its Reichsbank and Golddiskontbank accounts (I R 25-30). Both banks expressed readiness to comply in full with the Custodian's vesting orders if the writs of attachment which had been served upon them were vacated (I R 28, 30; II R 26).

The writs involved were procured by the petitioners Zittman and McCarthy in actions which they commenced against the Deutsche Reichsbank and the Deutsche Golddiskontbank in the Supreme Court of New York, Kings County, on December 11, 1941, and January 20, 1942⁵ (I R 56,

⁴ This is the only particular in which there is a significant difference between the two cases.

⁵ This was more than six months *after* freezing controls were applied to German-owned property located in this country. Executive Order No. 8389 (April 10, 1940, 5 F. R. 1400) as amended by Executive Order No. 8785 (June 14, 1941, 6 F. R. 2897).

66; II R 52, 64). Default judgments were subsequently entered in those actions following service by publication (I R 58, 68; II R 52, 65-66). Petitioners never obtained a license from the Treasury authorizing them to acquire interests in the bank accounts in question or to satisfy their judgments out of them (I R 7-8, 11-12, 55, 65; II R 6-7, 10-11, 52, 63).^a Accordingly, there has been no execution on the judgments (I R 7-8, 55, 66; II R 6-7, 52, 63).

It was stipulated by the parties that the Treasury Department, in administering the freezing controls, advised persons who made inquiry concerning the possibility of securing adjudication of their rights *vis-a-vis* owners of blocked property, that the regulations did not in any way forbid the bringing of suits in the courts or the resort to judicial process (including writs of attachment), but that a license was required before a judgment obtained in any suit could be satisfied out of blocked property. It was also stipulated that on various occasions the Treasury has specifically licensed payments from blocked accounts in satisfaction of judgments obtained against blocked nationals in suits instituted by attachment. (I R 84-96; II R 73-82.)

Petitioners Zittman and McCarthy contested respondent's claim that he is entitled to the money held in the accounts, on the ground that their at-

^a Petitioner McCarthy filed applications for licenses which were denied (I R 12, 55; II R 11, 53).

attachments gave them antecedent property rights in those accounts superior to those which the Custodian took under his vesting orders (I R 61, 70; II R 58, 68). Petitioner McCloskey adopted these contentions and also urged that, if the court should find respondent entitled to the property in issue, it should nonetheless provide for payment to him of poundage fees (I R 74; II R 72).

The District Court held that all German-owned property having a situs in this country was effectively frozen on June 14, 1941; that "judicial process cannot, without a license or other authorization from the Secretary [of the Treasury], create any interest in blocked property"; and that no such authorization was in fact granted. It also held that the Sheriff's claim for poundage necessarily fails because no interest in the blocked property passed under the attachments. It accordingly declared respondent entitled to the entire balances remaining in the vested accounts (I R 97-102).

The Court of Appeals affirmed as to petitioners Zittman and McCarthy on the authority of *Propper v. Clark*, 337 U. S. 472, and as to petitioner McCloskey on the ground stated by the District Judge (II R 99-100).

After decision by this Court in the case of *Singer v. Yokohama Specie Bank*, 339 U. S. 841, petitioners applied for a rehearing. Their applications were denied (II R. 121-122).

ARGUMENT

As the court below held, the decision in this case is controlled by *Propper v. Clark*, 337 U. S. 472. That case and this involve the general question whether a creditor could, without appropriate federal authorization, acquire rights in blocked assets which could prevail against a subsequent vesting by the Alien Property Custodian of the interest of the enemy debtor in those assets. In *Propper*, where the creditor proceeded by receivership, this Court held he could not prevail. The logic of that decision also required the holding below that he could not prevail where he proceeded by attachment. The *Propper* case also established that certain general rulings and regulations of the federal authorities could not be regarded as authorizing the acquisition of such rights; the further question of fact presented in the instant case as to whether certain informal communications by the Secretary of the Treasury amounted to an authorization permitting the acquisition of rights *in rem* by unlicensed attachment was correctly decided by the court below. The *Propper* case is also dispositive of the question whether the federal courts properly exercised jurisdiction to render a declaration of rights. The decision below is not in conflict with any decision of this Court or of a federal court of appeals. The practical importance of the questions presented is confined almost entirely to the State of New York; hence the decision below has

effectively disposed of the problem, and there is no necessity for further review.⁷

I

Executive Order No. 8389, as amended,^{7a} provides:

SECTION 1. All of the following transactions are *prohibited*, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise if * * * such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States * * *;

B. All payments by or to any banking institution within the United States;

* * * * *

⁷ Although we believe the issues here raised were disposed of in the *Propper* case, we have, because of the vigor and length with which they have been presented by the various petitioners herein, thought it advisable to answer in some detail the contentions advanced. In so doing, we have felt that it would better serve this Court's convenience to repeat, where necessary, some of what we said in *Propper*, rather than require reference back to the *Propper* brief for a full understanding of our position.

^{7a} The President's authority to issue the Order rests upon Section 5(b) of the Trading With the Enemy Act, as amended by the Joint Resolution of May 7, 1940 (54 Stat. 179), and as further amended by the First War Powers Act of 1941, Section 301 (55 Stat. 839).

E. All *transfers*, withdrawals, or exportations of, or *dealings in*, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions. [*Italics added.*]^a

The Order became effective as to German property in this country as of June 14, 1941 (Executive Order No. 8785, 6 F. R. 2897). Petitioners recognize that they cannot be paid out of the blocked accounts without a license, but nonetheless contend that the Order did not prevent them from acquiring an indefeasible interest in the blocked property by means of their attachments. Section 1E of the Order makes it plain, however, that its prohibitions were direct and not merely against payments out of blocked funds but against any transfer of interest in blocked property. The proscription is against "all transfers, * * * or dealings in, any evidences of indebtedness or evidences of ownership of property." Whether the blocked accounts here involved be considered as trust funds for the benefit of the Reichsbank and the Golddiskontbank or whether only the usual debtor-creditor relationship was created by the deposits, it is plain that the accounts fall within the

^a There is no dispute that the Reichsbank and the Golddiskontbank are banks organized under the laws of Germany and are nationals within the ambit of the Order.

description "evidences of indebtedness or evidences of ownership of property." Any attempts, therefore, by the petitioners to acquire an interest in the accounts by the writs of attachment necessarily constituted acts of "transfer" or "dealing in" such evidences of indebtedness or ownership and required a license.

Petitioners stress that nothing in the Trading With the Enemy Act or in the freezing regulations prohibits the bringing of suits against enemy nationals in time of war. This is correct. Indeed, the Treasury Department in administering the controls took the position from the outset that parties were free to seek adjudications of their rights *vis-a-vis* blocked nationals. This does not alter the fact, however, that transfers of interests in property subject to the controls may not be effected without a license and that it is immaterial whether the attempted transfer is by voluntary assignment or by means of judicial process. That the prohibitions go to both categories of transfers was squarely decided by this Court in *Propper v. Clark, supra*. The court below was clearly correct in holding that decision dispositive of the present litigation.⁹

⁹ We believe that there is an additional ground for upholding the respondent's position in the cases involving the Federal Reserve accounts. Since the Act does not specify that the Custodian's findings must take a particular form, the turnover directive addressed to Federal Reserve, finding that a specific sum was enemy property, must be read in conjunction with the vesting order in determining what the Custodian proposed to seize. *In re Yokohama Specie Bank, Ltd.*, 188 Misc. 137,

In *Propper*, the Custodian sought a declaration that he was entitled under a vesting order to funds held by an American Society (ASCAP) for an Austrian national. He also sought a declaration that a permanent receiver appointed subsequent to freezing by a New York court pursuant to a New York judgment, for the purpose of receiving and reducing to possession the local assets of the Austrian national, acquired no interest in the blocked property held by ASCAP in the absence of a federal license. It was conceded that, had there been no freezing controls in effect, the permanent receiver would have taken title to the property.

The parallel between *Propper* and the instant cases is obvious. In both, New York claimants, proceeding under New York law, sought to realize on the local assets of enemy nationals. In both, they availed themselves of provisional remedies and obtained default judgments in proceedings grounded on substituted service. In both, they

141, 66 N. Y. S. 2d 289, 293. So read, it is apparent that the Custodian did not vest an indeterminate interest in the Federal Reserve accounts, leaving open for judicial determination the *quantum* of that interest, but rather vested a specific *res*. Where he vests a described *res*, the Custodian is clearly entitled to immediate possession (*Silesian-American Corp. v. Clark*, 332 U. S. 469; *Commercial Trust Co. v. Miller*, 262 U. S. 51; *Central Union Trust Co. v. Garvan*, 254 U. S. 554) and the only remedy of a non-enemy claiming an interest in the property is by suit under Section 9(a) (*ibid.*). Since the court below quite correctly determined, however, that these petitioners could not have acquired any interest in either the Chase or Federal Reserve accounts because of the impact of freezing, it became unnecessary to consider the difference between the character of the vestings in the two cases.

contended that New York's judicial process had given them an interest in the property itself which prevented the Custodian from taking it under a vesting order. And in both the process upon which they relied had been issued after the freeze date and without a federal license. In *Propper*, as here, it was contended by the petitioner that the freezing prohibitions did not prevent transfer of an interest in the property, but only purported to screen payments by means of a licensing system. This argument was flatly rejected by the Court of Appeals for the Second Circuit, which stated [169 F. 2d 324, 327]:

The language of Exec. Order 8389 prohibits the unlicensed transfer of an enemy alien's property. There is no cogent reason for excepting transfers by judicial process. To allow the exception would be to furnish a means of evasion by which the impact of freezing controls could be avoided by recourse to judicial proceedings. Such would negate the executive and legislative intention.

Affirming that decision, this Court declared [337 U. S. at pp. 480, 486]:

The Executive Order of June 14, 1941 * * * specified the prohibited transactions * * * by categories so all-inclusive as to make it clear that the purpose was to require transactions involving property of nationals of designated foreign countries to be carried out under regulations of this Government, except certain

transactions such as are provided for in General Ruling No. 12, April 21, 1942, 7 Fed. Reg. 2991. * * *

* * * * *

It is our conclusion that the Joint Resolution of May 7, 1940, and the Executive Order of April 10, 1940, put into effect a valid plan for control of the property covered by the regulation that prohibited any change of title to that property by reason of the subsequent appointment of petitioner as permanent receiver. We do not now undertake to say whether every determination of rights concerning blocked property in unlicensed litigation is voidable. We base our determination on the purpose of Congress to prevent shifts in title to blocked assets and the prohibition of the Executive Order against transfers of such a credit as this. The language of the order prohibits more than payment. It prohibits transfers of credit. * * *

Petitioners urge that *Propper* is distinguishable because the immediate question there was whether title to the blocked property could shift to the receiver. An attaching creditor, they argue, obtains a lien or security interest in the property, but does not acquire the title until the lien is satisfied (see Br. in No. 298, pp. 51-52, Br. in No. 314, pp. 27-28). Granting this to be so, the attempted distinction is nevertheless without substance. On the face of it, it is little short of absurd to suggest that, while

creditors of an enemy national are precluded from reaching his blocked property in the absence of a license where they proceed by securing the appointment of a receiver, the opposite result will be permitted where they follow the parallel avenue of attachment. Certainly there is nothing in the language of the freeze order, in the purposes of the controls or in the rationale of the *Propper* decision that would countenance such a paradoxical result.

As emphasized above, the freeze order "prohibits more than payment"; it prohibits all unlicensed "transfers * * * or dealings in" blocked property. And to hold that one could transfer valuable rights in blocked property so long as title did not pass—that one could remove the meat so long as the shell remained—would ignore the plain mandate of the Order.

It would also, of course, defeat the basic purposes of the controls. A primary objective of freezing was to prevent the Axis countries from drawing sustenance from property within the jurisdiction of the United States. (Cf. *Propper v. Clark*, *supra*, at p. 481.) It was recognized that if only payments out of blocked property were proscribed it would be a simple matter for the aggressor nations to sell interests in blocked property (either those of their own nationals or those owned by nationals of the invaded countries) to friendly speculators willing to buy at a discount and to await payment on the ultimate day of unblocking. See 86 Cong. Rec. 5006-08, 5168-83; H. Rep. 1507, 77th

Cong., 1st Sess., p. 3; S. Rep. 911, 77th Cong., 1st Sess., p. 2.

To hold that *any* interest in blocked property may pass without a license would frustrate the objective. The possibility of assigning interests by attachments furnishes one illustration. Let us suppose the case of a German national who had a million dollars in New York at the time the freeze went into effect. If a non-enemy speculator could acquire an indefeasible lien on that property by the simple expedient of filing a complaint, fictitious or otherwise, procuring a writ of attachment, and then obtained a default or confessed judgment, can it be doubted that he might be willing to pay the German handsomely with "free" money for the privilege?¹⁰ Yet, that was the very kind of transaction freezing was designed to make unprofitable.

A second, closely related, objective of the program was to preserve blocked property for possible future vesting, to keep it intact "until the Government could determine whether those assets were needed for prosecution of the threatened war or to compensate our citizens or ourselves for the damages done by the governments of the nationals affected." *Propper v. Clark, supra*, at p. 484. Petitioners state that in *Propper* the Court was ad-

¹⁰ This illustration is designed to show the dangers to the freezing program implicit in petitioners' theory. No implication is intended that there was any impropriety in connection with the actions which these petitioners brought against the Reichsbank and the Golddiskontbank.

dressing itself to transfers of title. It is true that that was the kind of transfer there presented. It can scarcely be supposed, however, that transfers of lesser property interests stand on any different footing and that this case is to be regarded as different because the lien asserted has not yet ripened into title. Indeed the Court spoke, more generally, of "transfers of credit" as prohibited (p. 486). It is unmistakably plain that to allow the creation of an indefeasible lien on blocked property would frustrate *pro tanto* the purpose of preserving it for possible future vesting, just as effectively as would an unauthorized transfer of title. This case proves the point. These petitioners are seeking to resist the claim of the Custodian to take property that was admittedly enemy-owned on June 14, 1941, and they rely solely on liens which they claim to have acquired subsequent to that date and which they assert to be indefeasible.

Still another purpose in preventing unlicensed transfers of enemy property was the protection of all United States citizens having claims against enemy nationals. The importance of this aspect of freezing was recognized at an early date. When the Congress ratified Executive Order No. 8389 in April 1940, Senator Barkley stated (86 Cong. Rec. 5006) :

It should also be stated—and I am sure the Senator [Wagner] omitted it by oversight—that the joint resolution is intended not only

to protect the nationals of Norway and Denmark who have interest in stocks, securities, and other property in the United States, but it is also intended to protect American citizens in the event they have claims of any sort growing out of these transactions, and therefore we preserve the property not only for its owners but for the benefit of Americans who may have claims.

It was also emphasized in *Propper* that one of the objectives in immobilizing enemy property had been to hold it available for future compensation of "our citizens or ourselves" (337 U. S. at p. 484).

This objective was carefully implemented in 1946 by the addition to the Trading With the Enemy Act of Section 34, which establishes a complete scheme for the satisfaction of persons to whom the former owners of vested property were indebted. That Section provides that vested property held by the Custodian shall be "equitably applied" to debts owed by the pre-vesting owner (§ 34(a)). It further declares that no debt claim is to be allowed "if it arose from any action or transaction prohibited by or pursuant to this Act and not licensed or otherwise authorized pursuant thereto * * *." While the Section provides for certain priorities (§ 34(g)); e.g. wage and salary claims, it grants none to persons who obtained unlicensed writs of attachment against the property later vested. In cases where the aggregate of valid debt claims

against a particular debtor exceeds his vested assets, the Custodian is directed to make a *pro rata* allocation (§ 34(f)). To interpret Executive Order No. 8389, therefore, as permitting a transfer of property to one creditor by unlicensed attachment or judgment would be a manifest contradiction of the fixed intent of Congress to treat all creditors alike.¹¹

Apparently recognizing that there is no real distinction to be drawn between the instant case and *Propper*, petitioners argue that the court below erred "in choosing *Propper v. Clark* * * * as its guide" instead of the decision in *Lyon v. Singer*, 339 U. S. 841 (see e.g. Br. in No. 298, p. 18). As this Court explicitly pointed out, however, in its opinion in *Singer*, there is no disparity in the results reached in those two cases. Indeed, it was only because this Court found the New York Court of Appeals' holding in *Singer* consistent with *Propper* and with the purposes of the freezing and vesting programs that it affirmed the judgment in that case. While the New York Court of Appeals' opinion is not free from ambiguity, this Court's decision is clear. It stands as a reaffirmation of the doctrine of the *Propper* case.

The question in *Singer* was whether a claimant was entitled under the New York Banking Law

¹¹ Of course, where it is clear that the assets are more than sufficient to pay all creditors the force of these considerations may disappear. Accordingly, in some instances, transfers to creditors of blocked nationals have been licensed.

to status as a preferred creditor with respect to the assets of a Japanese corporation held by the New York Superintendent of Banks as a statutory liquidator. The transactions with the Japanese corporation upon which the claim of preference was based had been concluded after freezing. This Court construed the decision of the New York Court of Appeals (which it affirmed) as holding that under New York law "the transactions gave rise to a preferred claim in the liquidation, but that payment by the liquidator must await specific licensing by the Alien Property Custodian of the *transactions underlying the claims*" (italics added), *Lyon v. Singer, supra*, at p. 842. The opinion thus reaffirms the principle that not only payment but the "underlying transactions" require a license before they can take effect. This is given added point by the statement which followed (pp. 842-843):

Our decision in *Propper v. Clark*, 337 U. S. 472, does not require a contrary conclusion. There the liquidator claimed title to frozen assets adversely to the Custodian, and sought to deny the Custodian's paramount power to vest the alien property in the United States. No such result follows from the New York court's judgments in the present cases.

Petitioners state that the Custodian did not vest the *res* in the instant cases (which is true so far as

the Chase accounts are concerned¹²) and argue that the vesting power is, therefore, not in issue (see Br. in No. 298, pp. 18-19, 52-53, Br. in No. 314, p. 30). It is true that where the Custodian vests the enemy interest in designated property and leaves open for judicial determination the existence of any adverse interest in that property (which is the exact course that was followed in *Propper*¹³), the power to take immediate possession by summary seizure is not in issue. But there is no question that in a proceeding brought to enforce an "interest" vesting, the Custodian is entitled to take the total enemy interest as determined by the court. As held in *Propper*, that means the total enemy interest as it existed on the date of freezing, save to the extent that subsequent transfers were licensed. The reach of the Custodian's vesting is in issue here in exactly the same way as it was in *Propper*. And to accord him anything less than the total enemy interest as it stood on the freeze date would, in the words of this Court, "deny the * * * paramount power to vest * * * alien property in the United States."

II

Petitioners also argue that, whatever the scope

¹² With reference to the Federal Reserve accounts, see note 9, *supra*.

¹³ The vesting order involved in *Propper* (No. 2097, 8 F. R. 16463) was of the "right, title and interest" variety. And the Custodian there sought a declaration from the court that the receiver had no "right, title or interest in the claim in question," 337 U. S. at p. 475.

of the Executive Order, the Secretary of the Treasury relieved them from the effect of its prohibitions and authorized the acquisition of the property interests to which they lay claim. They concede that no specific license was granted them but suggest that a general authorization is to be inferred. The court below found that no authorization was in fact granted, a determination which we believe to be clearly correct.

Petitioners point to the fact that suits against blocked nationals were not prohibited by the terms of the Act or the freezing regulations issued thereunder. They also stress respondent's stipulation to the effect that Treasury had written letters advising prospective litigants that no license was required to institute suit or to secure the issuance of a writ of attachment or other judicial process. Petitioners contend that these statements must be read as implying a general authorization to acquire interests in blocked property without a license.

Derogations from the broad prohibitions of a law are not to be inferred in the absence of a clear expression of intent to create the exception. *Yu Cong Eng v. Trinidad*, 271 U. S. 500, 518-519; *Spokane & Inland R. R. v. United States*, 241 U. S. 344, 350. If the Treasury had intended to create a general exception whereby interests in blocked property might be transferred by resort to attachments or other judicial process, presumably it would have followed its regular practice of issuing a General License and publishing it in the Federal

Register and in the Code of Federal Regulations.¹⁴ It did no such thing. On the contrary, every public pronouncement which the Treasury has made on the subject emphasizes that interests in blocked property may *not* be transferred by means of attachments unless a license is granted.

On April 21, 1942, the Secretary announced General Ruling No. 12, 7 F. R. 2991, which provides in part:

(1) Unless licensed or otherwise authorized by the Secretary of the Treasury, (a) any transfer after the effective date of the Order [Executive Order No. 8389] is *null and void* to the extent that it is (or was) a transfer of any property in a blocked account at the time of such transfer;

* * * * *

(5) For the purposes of this general ruling:

(a) The term "transfer" shall mean any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent, or effect of which is to create, surrender, release, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property and without limitation upon the

¹⁴ Ninety-seven such licenses have been published to date. See Code of Federal Regulations, 1949 ed., Title 8, c. II § 511.

foregoing shall include the * * * *creation or transfer of any lien; the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution or other judicial or administrative process or order, or the service of any garnishment; * * ** [Italics added]

In Press Release No. 34, U. S. Treasury Dept., *Documents Pertaining to Foreign Funds Control* (1946), pp. 71-73 (App. pp. 65, 73), accompanying General Ruling No. 12 the Secretary pointed out:

*Unlicensed transfers of blocked assets always have been void and unenforceable under the freezing orders and * * ** [General Ruling No. 12] serves the purpose of emphasizing this fact for the benefit of any of the public who may have overlooked this aspect of freezing control. * * * The term "transfer" is given a very comprehensive meaning, excepting only certain types of transfers by operation of law (e.g., transfer by intestate succession). [Italics added]¹⁵

¹⁵ While General Ruling No. 12 was published subsequent to the time that the writs of attachment here involved were issued, that Ruling is a statement of the Treasury position as adopted from the inception of freezing. In *Dropper*, also, the petitioner's appointment as permanent receiver antedated publication of the Ruling. The Ruling was declared "useful" as a statement of the position taken in the administration of the controls. 337 U. S. at pp. 485-486.

The provisions of paragraph 4 of General Ruling No. 12 did not alter this prohibition against the transfer of interests by attachments, levies, or other judicial process. Paragraph 4 reads:

(4) Any transfer affected by the Order and/or this general ruling and involved in, or arising out of, any action or proceeding in any Court within the United States shall, so far as affected by the Order and/or this general ruling, be valid and enforceable for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated: *Provided, however,* That no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license.

The proviso distinctly states that no judicial process shall confer or create a greater interest in any property in a blocked account than the owner of the property could create or confer by voluntary act without a license. Obviously under the other provisions of Executive Order No. 8389 and General Ruling No. 12 an attempted voluntary assignment by the Reichsbank or the Golddiskontbank would have been ineffective to pass any inter-

est in the blocked property. In short, while paragraph 4 makes it plain that the Treasury did not impose an absolute prohibition on litigation relating to blocked property or on the use of such property as a basis for the exercise of jurisdiction over its nonresident owner, it also clearly specifies the limits beyond which the courts might not go. The paragraph is clearly *not* a consent to the acquisition, as the result of judicial action, of any interest in blocked property. It permits judicial action only to the extent that such action is possible without transferring an interest in blocked property, or otherwise effectuating a transaction prohibited by the Order. The press release contemporaneously issued (Press Release No. 34, *supra*) emphasizes the same point:

Paragraph (4) is but a formal statement of the position which the Treasury Department has always taken on litigation (including attachments) affecting blocked assets. The Treasury has no desire to limit the bringing of suits in courts within the United States: *Provided*, That no greater interest is created by virtue of the attachment, judgment, etc., than the owner of the blocked account could have voluntarily conferred without a license. Thus, the Treasury does not want to interfere with the orderly consideration of cases by the courts provided that the results of court proceedings are subject to the same policy con-

sideration from the point of view of freezing control as those arising through voluntary action of the parties.

The limited effect of paragraph 4 of General Ruling No. 12 was again reaffirmed in unmistakable terms by the Treasury Department in Public Circular No. 31, issued on August 2, 1946, 11 F. R. 8351:

* * * * *

(3) An attachment is a "transfer." See paragraph (5) of General Ruling No. 12, where the term "transfer" is defined as including "the issuance, docketing, filing, or other levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment." *An unlicensed attachment, therefore, cannot operate to transfer or create any interest in blocked property.* Nor can it serve as a basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any blocked property.

(4) Paragraph (4) of General Ruling No. 12 does not constitute a license authorizing the seizure or creation of any interest in blocked property by attachment proceedings or other legal process. This paragraph merely is a formal statement of the position which the

Treasury Department has always taken with respect to litigation affecting blocked property—that it does not desire to interfere with such litigation so long as it is clearly understood that the judicial process cannot, without a license or other authorization from the Secretary of the Treasury, operate to transfer or create any interest in blocked property. Thus the proviso of paragraph (4) specifies that “no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license.” In issuing paragraph (4), the Treasury Department did not undertake to decide for the courts whether they should exercise jurisdiction. *It simply prescribed that jurisdiction could be exercised only on the basis that if a Treasury license was not issued, the judicial process could not operate to transfer or create any interest in blocked property, nor could it be the basis for the assertion or recognition of any other right, remedy, power, or privilege with respect to the property.* [Italics added]

Whether the courts of a particular state will permit jurisdiction over an absent defendant to be

founded on such a limited control by its officers of the defendant's property, or whether a court will initially entertain proceedings in which it is powerless to render an unrestricted judgment against blocked funds, are questions which fall outside this case. The only issue here is whether petitioners acquired any lien upon, or interest in, the particular accounts. In the face of Executive Order No. 8389 and General Ruling No. 12, it is manifest that they could acquire no such interest after June 14, 1941, in the absence of a Treasury license.¹⁶

Petitioners seek comfort from the fact that in the case of *Commission for Polish Relief Ltd. v. Banca Nationala a Romaniei*, 228 N. Y. 332, 43

¹⁶ Of the cases cited by petitioners, the only one which supports their contention to the contrary is *Sun Insurance Office, Ltd. v. Arauca Fund*, 84 F. Supp. 516 (S. D. Fla.). The court stated in that case:

"... the libellant herein had a valid attachment lien on the vessel by virtue of its attachment of July 12, 1941, notwithstanding the fact that no license authorizing said attachment was secured from the Secretary of the Treasury under the provisions of Executive Order 8389. No license or permit under said Executive Order was required to validate libellant's attachment lien." [pp. 518-519]

Nothing on this point appears in the opinion beyond the bare statement quoted above. There is no discussion or analysis whatever of the controls or of their purpose and there is no way of ascertaining how the court arrived at its conclusion. In the face of the language of the Order and the regulations, and this Court's definitive decision in *Propper*, the conclusion is believed untenable. The decision in *Sun Insurance* was not appealed by the Custodian because the court held on other grounds that the libellant was not entitled to a recovery.

N. E. 2d 345, the Treasury, appearing as *amicus curiae*, advised the New York Court of Appeals that it believed jurisdiction might be exercised on the basis of a writ of attachment directed against a nonresident's blocked property (Br. in No. 298, pp. 11-12, Br. in No. 314, pp. 11-12). But while petitioners repeatedly emphasize this aspect of the Treasury's position, they are prone to overlook, throughout their arguments, the limiting condition: That no interest in the property might pass unless and until a license was obtained. The Government's brief in the *Polish Relief* case stated:

An attachment action against a national's blocked account is an attempt to obtain an unlicensed assignment of the national's interest in the blocked account—nothing more and nothing less.

In this sense, the attachment action might be regarded as a levy upon the national's contingent power (i.e. contingent upon Treasury authorization) to transfer all his interest in the blocked account to A; any judgment in the attachment action resulting in giving A a contingent interest in the account equivalent to what he would have obtained by voluntary assignment.

The value of such an interest is of course problematical. Whether it is worthless or worth full value will depend upon whether the transfer sought is in accordance with the Gov-

ernment's policies in administering freezing control.

Under this analysis of what the nature of any attachment action against a blocked account must be, in the light of the purposes of freezing control, it is suggested that an attachment action of this nature might well be allowed in the New York courts.

The fact that the contingent interest involved in an attachment action such as that in question is *null and void unless authorized by the Secretary of the Treasury* should not be regarded as preventing such contingent interest from being the basis for an attachment action. An interest which is *null and void unless authorized by the Secretary* is not the same as an interest which is *null and void* unconditionally. Many of the interests which have already been the subject of attachment in the New York courts were also, from a realistic point of view, conditionally null and void. The fundamental issue, as indicated by the decisions in the New York courts, is whether the interest involved may, upon the happening of a certain condition ripen into a vested interest. If this is possible, and the condition is not too unreal, the courts will allow the attachment action. It is believed that the condition that the Secretary of the Treasury may authorize a transfer, if such transfer is in accordance with the policies of the Federal Gov-

ernment, is not too unreal a condition. [pp. 52-53]

The Court of Appeals adopted the Treasury view. It declared, first, that "the words of the Chief Executive of the nation must be taken to have *deprived the defendant of power to transfer any interest* in these blocked accounts except through the medium of assignment subject to a releasing of the credit by the Secretary of the Treasury" (italics added), 288 N. Y. at p. 337, 43 N. E. 2d at p. 347. It then went on to hold that the attachments were nonetheless sufficient to permit an adjudication of the rights of the parties, stating (288 N. Y. at p. 338, 43 N. E. 2d at p. 347):

The Executive Order did not forbid attachment of the conceded interest of the defendant in the credits upon which the levies were made. For all we know, payment of the blocked accounts to the credit of this action can be permitted consistently with the purpose of the Order. We are not to presuppose that this will inevitably be refused in the event of a judgment for the plaintiff. * * * The lien of an attachment is always hypothetical in some degree. A "seizure subject to license" was, we think, sufficient for the purpose of jurisdiction in rem over the deposits in question.

Three dissenting judges took the position that the "interest" sought to be attached was too "illus-

ory" and that the cause should not be entertained (288 N. Y. at p. 341, 43 N. E. 2d at p. 349). In reaching their respective decisions, however, both the majority and the dissenting judges explicitly determined that, in the face of the Executive Order, neither the attachment nor the judgment of the court could transfer any interest in the funds in the absence of a license.

Petitioners also question the correctness of the Treasury position. They say that under the doctrine of *Pennoyer v. Neff*, 95 U. S. 714, a court has no jurisdiction over a nonresident defendant unless there is a valid seizure of his property within the state (see especially Br. in No. 298, p. 48 *et seq.*). It is apparently their view that a "seizure subject to license" could not confer jurisdiction and that any judgment based upon such a "seizure" would suffer from constitutional infirmities. Accordingly they urge that the Treasury's statements that suits might be instituted by attachment should be interpreted (notwithstanding the limiting condition stated) to mean that an attaching creditor required no license in order to acquire a lien interest in blocked property.

To begin with, we do not believe that the doctrine of *Pennoyer v. Neff* is so rigid as to compel any such conclusion as that which petitioners assert. The decisions indicate that if there is property of a nonresident within a state and some means whereby the court may assert control over

that property, jurisdictional requirements are satisfied, provided reasonable notice is given. Chief Justice Holmes stated in *Tyler v. Judges of the Court of Registration*, 175 Mass. 71, 78, 55 N. E. 812, 815, that "when it is considered how purely formal such an act [seizure] may be, and that even adverse possession is possible without ever coming to the knowledge of a reasonably alert owner, I cannot think that the presence or absence of the form makes a constitutional difference." That there is no requirement of an unconditional or absolute seizure is also emphasized by this Court's decision in *Securities Savings Bank v. California*, 263 U. S. 282, which involved an action brought by California against a local bank to have unclaimed deposits declared escheat and transferred to the State. It was held that notice to foreign depositors by publication was sufficient although there had been no actual seizure of the funds. Mere service of the complaint upon the bank was found to meet constitutional requirements. Cf. *Pennington v. Fourth National Bank*, 243 U. S. 269. And see also *The Requirement of Seizure in the Exercise of Quasi in Rem Jurisdiction: Pennoyer v. Neff Re-examined*, 63 Harv. L. Rev. 657 (1950). It is believed that the New York Court of Appeals was equally justified in holding in the *Polish Relief* case that service of a writ of attachment on a New York bank holding a nonresident's blocked funds was "sufficient for the purpose of jurisdic-

tion" although the "seizure [was] subject to license."¹⁷

In any event, however, the constitutional requirements with respect to the exercise of jurisdiction *quasi in rem* are not in issue. Whether the Treasury was right or wrong in suggesting that a "seizure subject to license" might be regarded as a sufficient basis, there is no blinking the fact that the regulations did not permit any other kind of "seizure". They plainly state that "an unlicensed attachment * * * cannot operate to transfer or create any interest in blocked property" (Public Circular No. 31, *supra*). The court below correctly

¹⁷ The courts of some jurisdictions have gone further. Thus, in Wisconsin, it has been held that no seizure of any kind is necessary to confer jurisdiction and that it is sufficient if property is physically located within the State at the commencement of the action and is specifically described in the affidavit upon which the order of publication is based. In *Disconto Gesellschaft v. Umbreit*, 127 Wis. 651, 670-671; 106 N. W. 821, 826-827, affirmed on other grounds, 208 U. S. 570, it is stated:

"It has also been held by this court * * * that it is not essential that the property within the state be seized by writ of attachment, but that, if the facts required by the statute to authorize the order for publication appeared by proper affidavit, the court would acquire jurisdiction to render a judgment good at least against the property described in the moving papers, providing it had not been removed from the state or sold to an innocent purchaser before the rendition of the judgment."

See also *Pilger v. Sutherland*, 57 F. 2d 604, 607 (C. A. D. C.); *Doerschuck v. Mellon*, 55 F. 2d 741 (C. A. D. C.); *Tyler v. Judges of the Court of Registration*, *supra*.

determined that petitioners were not authorized to acquire the property interests which they claim.¹⁸

III

Petitioners argue that the court below failed to give full faith and credit to the New York judgments which they obtained (Br. in No. 298, p. 54 *et seq.*, Br. in No. 314, pp. 31-32). That is a misconception. The issue here is simply whether German-owned property which was frozen as of June 14, 1941, by an exercise of paramount federal power could thereafter *become* subject to disposition by the New York courts without the grant of a federal license. That issue was settled in *Propper* when this Court held, in an identical proceeding brought by the Custodian in the federal courts for a declaration of his rights under a vesting order, that a New York State judgment was ineffective to confer title to blocked property upon a court-appointed receiver, absent a federal license. There can be no question of giving full faith and credit for the simple reason that the New York judgments (which were not *in personam*) never became operative with respect to property theretofore blocked by the President.

Petitioners also urge that the Custodian should have been required to go into the state courts for

¹⁸ The claim of the Sheriff to poundage is not separately treated in this brief since it is clear that his right to fees (other than those which he initially received for the ministerial act of serving the writs) is dependent upon whether liens were obtained by the other petitioners. His petition recognizes this (No. 324, p. 9).

a clarification of his rights. The holdings in *Markham v. Allen*, 326 U. S. 490, and *Propper v. Clark* are decisive against them.

In *Allen* the Custodian brought suit in the federal courts under Section 17 of the Act to secure an adjudication of his asserted right in a decedent's estate being administered by a state court of probate. Speaking for the Court, Chief Justice Stone declared (326 U. S. at p. 494) that "while a federal court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a state court, * * * it may exercise its jurisdiction to adjudicate rights in such property where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court." Addressing himself to the question of discretion, the Chief Justice stated (p. 496):

Although the district court has jurisdiction of the present case under § 24(1) of the Judicial Code, irrespective of § 17, the latter section plainly indicates that Congress has adopted the policy of permitting the Custodian to proceed in the district courts to enforce his rights under the Act, whether they depend on state or federal law. The cause was therefore within the jurisdiction of the district court, which could appropriately proceed with the case, and the Court of Appeals erroneously ordered its dismissal.

The same objections were also raised in *Propper*. It is to be noted that in that case there was an antecedent question of state law presented, namely, whether Propper's appointment as a *temporary* receiver prior to freezing had passed title to him as a matter of New York law.¹⁹ This Court nonetheless held (337 U. S. at p. 493):

The congressional purpose to put control of foreign assets in the hands of the President through the Custodian, so that there might be a unified national policy in the administration of the Act, argues strongly for federal determination of issues of rights in the blocked assets. Comity does not require abnegation to the extent that a federal court cannot adjudicate rights to the claim involved.²⁰

A fortiori, where, as here, there is no disputed issue of state law, the exercise of jurisdiction was entirely appropriate.

IV

Petitioners assert that the present case is a "test case" which will affect the disposition of a large number of similar cases involving many millions of dollars. We do not dispute that the amounts affected by the decision may be substantial. However, all the outstanding attachments to

¹⁹ It was the appointment as permanent receiver which post-dated the Order.

²⁰ Cf. *Riehle v. Margolies*, 279 U. S. 218, 225-226; *Fischer v. American United Insurance Co.*, 314 U. S. 549, 554-555.

which petitioner refers were levied within the State of New York. The files of the Office of Alien Property similarly indicate that the only pending cases involving unlicensed attachments in which that Office is interested arise in the State of New York. There is no reason to assume that the state courts in New York will not respect the adjudication made by the court below. Hence it is extremely unlikely that any conflict will arise which will call for resolution by this Court. The decision below would thus appear to have disposed effectively of the problem and we perceive no necessity for further review by this Court.

CONCLUSION

The issues of law presented are plainly governed by the prior decision of this Court upon which the court below relied. Accordingly, the petitions for writs of certiorari should be denied.

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October, 1950.

APPENDIX

1. Joint Resolution of May 7, 1940, 54 Stat. 179:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (b) of section 5 of the Act of October 6, 1917 (40 Stat. 411), as amended, is hereby amended to read as follows:

"During time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by or to banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, and any transfer, withdrawal or exportation of, or dealing in, any evidences of indebtedness or evidences of ownership of property in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest, by any person within the United States or any place subject to the jurisdiction thereof; and the President may require any person to furnish under oath, complete information relative to any transaction

referred to in this subdivision or to any property in which any such foreign state, national or political subdivision has any interest, including the production of any books of account, contracts, letters, or other papers, in connection therewith in the custody or control of such person, either before or after such transaction is completed."

SEC. 2. Executive Order Numbered 8389 of April 10, 1940, and the regulations and general rulings issued thereunder by the Secretary of the Treasury are hereby approved and confirmed.

* * * * *

2. Trading With the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U. S. C. 1 et seq:

* * * * *

Sec. 5, as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App. 5:

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to

any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property, shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and

further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * *

SEC. 17. That the district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled "An Act to codify, revise, and amend the laws relating to the judiciary."

* * * * *

SEC. 34. (a) Any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian. No debt claim shall be allowed under this section if it was not due and owing at the time of such vesting or trans-

fer, or if it arose from any action or transactions prohibited by or pursuant to this Act and not licensed or otherwise authorized pursuant thereto, or (except in the case of debt claims acquired by the Custodian) if it was at the time of such vesting or transfer due and owing to any person who has since the beginning of the war been convicted of violation of this Act, as amended, sections 1-6 of the Criminal Code (18 U. S. C. 1-6), title I of the Act of June 15, 1917 (ch. 30, 40 Stat. 217), as amended; the Act of April 20, 1918 (ch. 59, 40 Stat. 534), as amended; the Act of June 8, 1934 (ch. 327, 52 Stat. 631), as amended; the Act of January 12, 1938 (ch. 2, 52 Stat. 3); title I, Alien Registration Act, 1940 (ch. 439, 54 Stat. 670); the Act of October 17, 1940 (ch. 897, 54 Stat. 1201); or the Act of June 25, 1942 (ch. 447, 56 Stat. 390). Any defense to the payment of such claims which would have been available to the debtor shall be available to the Custodian, except that the period from and after the beginning of the war shall not be included for the purpose of determining the application of any statute of limitations. Debt claims allowable hereunder shall include only those of citizens of the United States or of the Philippine Islands; those of corporations organized under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia or the Philippine

Islands; those of other natural persons who are and have been since the beginning of the war residents of the United States and who have not during the war been interned or paroled pursuant to the Alien Enemy Act (50 U. S. C. 21); and those acquired by the Custodian. Legal representatives (whether or not appointed by a court in the United States) or successors in interest by inheritance, devise, bequest, or operation of law of debt claimants, other than persons who would themselves be disqualified hereunder from allowance of a debt claim, shall be eligible for payment to the same extent as their principals or predecessors would have been.

(b) The Custodian shall fix a date or dates after which the filing of debt claims in respect of any or all debtors shall be barred, and may extend the time so fixed, and shall give at least sixty days' notice thereof by publication in the Federal Register. In no event shall the time extend beyond the expiration of two years from the date of the last vesting in or transfer to the Custodian of any property or interest of a debtor in respect of whose debts the date is fixed, or from the date of enactment of this section, whichever is later. No debt shall be paid prior to the expiration of one hundred and twenty days after publication of the first such notice in respect of the debtor, nor in any event shall any payment of a debt claim be

made out of any property or interest or proceeds in respect of which a suit or proceeding pursuant to this Act for return is pending and was instituted prior to the expiration of such one hundred and twenty days.

(c) The Custodian shall examine the claims, and such evidence in respect thereof as may be presented to him or as he may introduce into the record, and shall make a determination, with respect to each claim, of allowance or disallowance, in whole or in part.

(d) Payment of debt claims shall be made only out of such money included in, or received as net proceeds from the sale, use, or other disposition of, any property or interest owned by the debtor immediately prior to its vesting in or transfer to the Alien Property Custodian, as shall remain after deduction of (1) the amount of the expenses of the Office of Alien Property Custodian (including both expenses in connection with such property or interest or proceeds thereof, and such portion as the Custodian shall fix of the other expenses of the Office of Alien Property Custodian), and of taxes, as defined in section 36 hereof, paid by the Custodian in respect of such property or interest or proceeds, and (2) such amount, if any, as the Custodian may establish as a cash reserve for the future payment of such expenses and taxes. If the money available hereunder for the payment of debt claims against

the debtor is insufficient for the satisfaction of all claims allowed by the Custodian, ratable payments shall be made in accordance with subsection (g) hereof to the extent permitted by the money available and additional payments shall be made whenever the Custodian shall determine that substantial further money has become available, through liquidation of any such property or interest or otherwise. The Custodian shall not be required through any judgment of any court, levy of execution, or otherwise to sell or liquidate any property or interest vested in or transferred to him, for the purpose of paying or satisfying any debt claim.

(e) If the aggregate of debt claims filed as prescribed does not exceed the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall pay each claim to the extent allowed, and shall serve by registered mail, on each claimant whose claim is disallowed in whole or in part, a notice of such disallowance. Within sixty days after the date of mailing of the Custodian's determination, any debt claimant whose claim has been disallowed in whole or in part may file in the District Court of the United States for the District of Columbia a complaint for review of such disallowance naming the Custodian as defendant. Such complaint shall be served on the Custodian.

The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to the claim in question. Upon good cause shown such time may be extended by the court. Such record shall include the claim as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, and the determination of the Custodian with respect thereto, including any findings made by him. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian, or could not reasonably have been adduced before him or was not available to him. The court shall enter judgment affirming, modifying, or reversing the Custodian's determination, and directing payment in the amount, if any, which it finds due.

(f) If the aggregate of debt claims filed as prescribed exceeds the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall prepare and serve by registered mail on all claimants a schedule of all debt claims allowed and the proposed payment to each claimant. In preparing such schedule, the Custodian shall assign priorities in accordance with the provisions of subsection (g) hereof. Within sixty

days after the date of mailing of such schedule, any claimant considering himself aggrieved may file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the Custodian as defendant. A copy of such complaint shall be served upon the Custodian and on each claimant named in the schedule. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to such schedule. Upon good cause shown such time may be extended by the court. Such record shall include the claims in question as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, any findings or other determinations made by the Custodian with respect thereto, and the schedule prepared by the Custodian. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian or could not reasonably have been adduced before him or was not available to him. Any interested debt claimant who has filed a claim with the Custodian pursuant to this section, upon timely application to the court, shall be permitted to intervene in such review proceedings. The court shall enter judgment affirming or modifying

the schedule as prepared by the Custodian and directing payment, if any be found due, pursuant to the schedule as affirmed or modified and to the extent of the money from which, in accordance with subsection (d) hereof, payment may be made. Pending the decision of the court on such complaint for review, and pending final determination of any appeal from such decision, payment may be made only to an extent, if any, consistent with the contentions of all claimants for review.

(g) Debt claims shall be paid in the following order of priority: (1) Wage and salary claims, not to exceed \$600; (2) claims entitled to priority under sections 191 and 193 of title 31 of the United States Code, except as provided in subsection (h) hereof; (3) all other claims for services rendered, for expenses incurred in connection with such services, for rent, for goods and materials delivered to the debtor, and for payments made to the debtor for goods or services not received by the claimant; (4) all other debt claims. No payment shall be made to claimants within a subordinate class unless the money from which, in accordance with subsection (d) hereof, payment may be made permits payments in full of all allowed claims in every prior class.

(h) No debt of any kind shall be entitled to priority under any law of the United States or any State, Territory, or possession thereof,

or the District of Columbia, solely by reason of becoming a debt due or owing to the United States as a result of its acquisition by the Alien Property Custodian.

(i) The sole relief and remedy available to any person seeking satisfaction of a debt claim out of any property or interest which shall have been vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the proceeds thereof, shall be the relief and remedy provided in this section, and suits for the satisfaction of debt claims shall not be instituted, prosecuted, or further maintained except in conformity with this section: *Provided*, That no person asserting any interest, right, or title in any property or interest or proceeds acquired by the Alien Property Custodian, shall be barred from proceeding pursuant to this Act for the return thereof, by reason of any proceeding which he may have brought pursuant to this section; nor shall any security interest asserted by the creditor in any such property or interest or proceeds be deemed to have been waived solely by reason of such proceeding. The Alien Property Custodian shall treat all debt claims now filed with him as claims filed pursuant to this section. Nothing contained in this section shall bar any person from the prosecution of any suit at law or in equity against the orig-

inal debtor or against any other person who may be liable for the payment of any debt for which a claim might have been filed hereunder. No purchaser, lessee, licensee, or other transferee of any property or interest from the Alien Property Custodian shall, solely by reason of such purchase, lease, license, or transfer, become liable for the payment of any debt owed by the person who owned such property or interest prior to its vesting in or transfer to the Alien Property Custodian. Payment by the Alien Property Custodian to any debt claimant shall constitute, to the extent of payment, a discharge of the indebtedness represented by the claim.

3. First War Powers Act, 1941, Title III, c 593, 55 Stat. 838, 840:

* * * * *

SEC. 302. All acts, actions, regulations, rules, orders, and proclamations heretofore taken, promulgated, made, or issued by, or pursuant to the direction of, the President or the Secretary of the Treasury under the Trading With the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, which would have been authorized if the provisions of this Act and the amendments made by it had been in effect, are hereby approved, ratified, and confirmed.

* * * * *

4. Executive Order No. 8389, April 10, 1940, 5 F. R. 1400, as amended by Executive Order 8785, June 14, 1941, 6 F. R. 2897:

By virtue of and pursuant to the authority vested in me by Section 5 (b) of the Act of October 6, 1917 (40 Stat. 415), as amended, by virtue of all other authority vested in me, and by virtue of the existence of a period of unlimited national emergency, and finding that this Order is in the public interest and is necessary in the interest of national defense and security, I FRANKLIN D. ROOSEVELT, PRESIDENT OF THE UNITED STATES OF AMERICA, do prescribe the following:

SEC. 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of, any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking

institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent, outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarking of gold or silver coins or bullion or currency, by any person within the United States;

E. All transfers, withdrawals, or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

* * * * *

SEC. 3. The term "foreign country designated in this Order" means a foreign country included in the following schedule, and the term "effective date of this Order" means with respect to any such foreign country, or any national thereof, the date specified in the following schedule:

* * * * *

(j) June 14, 1941—

Germany

SEC. 5.

E. The term "national" shall include,

(ii) Any partnership, association, corporation or other organization, organized under the laws of, or which on or since the effective date of this Order had or has had its principal place of business in such foreign country, or which on or since such effective date was or has been controlled by, or a substantial part of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly, such foreign country and/or one or more nationals thereof as herein defined,

F. The term "banking institution" as used in this Order shall include any person engaged primarily or incidentally in the business of banking, of granting or transferring credits, or of purchasing or selling foreign exchange or procuring purchasers and sellers thereof, as principal or agent, or any person holding

credits for others as a direct or incidental part of his business, or brokers; and, each principal, agent, -home office, branch or correspondent of any person so engaged shall be regarded as a separate "banking institution."

* * * * *

SEC. 7. Without limitation as to any other powers or authority of the Secretary of the Treasury or the Attorney General under any other provision of this Order, the Secretary of the Treasury is authorized and empowered to prescribe from time to time regulations, rulings, and instructions to carry out the purposes of this Order and to provide therein or otherwise the conditions under which licenses may be granted by or through such officers or agencies as the Secretary of the Treasury may designate, and the decision of the Secretary with respect to the granting, denial or other disposition of an application of license shall be final.

* * * * *

5. General Ruling No. 12, April 21, 1942, 7 F. R. 2991:

(1) Unless licensed or otherwise authorized by the Secretary of the Treasury, (a) any transfer after the effective date of [Executive Order No. 8389, see General Ruling No. 4, par. (1), *supra*] is null and void to the extent that it is (or was) a transfer of any property in a

blocked account at the time of such transfer; and (b) no transfer after the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account (irrespective of whether such property was in a blocked account at the time of such transfer).

(2) Unless licensed or otherwise authorized by the Secretary of the Treasury, no transfer before the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account unless the person with whom such blocked account is held or maintained had written notice of the transfer or by any written evidence had recognized such transfer prior to the effective date of the Order.

(3) Unless otherwise provided, an appropriate license or other authorization issued by the Secretary of the Treasury before, during, or after a transfer shall validate such transfer or render it enforceable to the same extent as it would be valid or enforceable but for the provisions of section 5 (b) of the Trading with the Enemy Act, as amended, and Order, regulations, instructions and rulings issued thereunder.

(4) Any transfer affected by the Order and/or this general ruling and involved in, or

arising out of, any action or proceeding in any Court within the United States shall, so far as affected by the Order and/or this general ruling, be valid and enforceable for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated; *Provided, however,* That no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license.

(5) For the purposes of this general ruling:

(a) The term "transfer" shall mean any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent, or effect of which is to create, surrender, release, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property and without limitation upon the foregoing shall include the making, execution, or delivery of any assignment, power, conveyance, check, declaration, deed, deed of trust, power of attorney, power of appointment, bill of sale, mortgage, receipt, agree-

ment, contract, certificate, gift, sale, affidavit, or statement; the appointment of any agent, trustee, or other fiduciary; the creation or transfer of any lien; the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment; the acquisition of any interest of any nature whatsoever by reason of a judgment or decree of any foreign country; the fulfillment of any condition, or the exercise of any power of appointment, power of attorney, or other power; *Provided, however,* That the term "transfer" shall not be deemed to include transfers by operation of law.

(b) The term "property" includes gold, silver, bullion, currency, coin, credit, securities (as that term is defined in section 2 (1) of the Securities Act of 1933, as amended), bills of exchange, notes, drafts, acceptances, checks, letters of credit, book credits, debts, claims, contracts, negotiable documents of title, mortgages, liens, annuities, insurance policies, options and futures in commodities, and evidences of any of the foregoing. The term "property" shall not, except to the extent indicated, be deemed to include chattels or real property.

(c) The term "blocked account" shall refer to a blocked account (including safe deposit

box) of a party to the transfer and shall have the meaning prescribed in General Ruling No. 4 except that it shall not be deemed to include an account not treated as a blocked account by the person with whom such account is held or maintained.

(d) The term "effective date of the Order" shall have the meaning prescribed in General Ruling No. 4 except that "the effective date of the Order" as applied to any person whose name appears on The Proclaimed List of Certain Blocked Nationals shall be the date upon which the name of such person first appeared on such list.

(e) The term "transfer by operation of law" shall be deemed only to mean any transfer of any dower, curtesy, community property, or other interest of any nature whatsoever, provided that such transfer arises solely as a consequence of the existence or change of marital status; any transfer to any person by intestate succession; any transfer to any person as administrator, executor, or other fiduciary by reason of any testamentary disposition; any transfer to any person as administrator, executor, or fiduciary by reason of judicial appointment or approval in connection with any testamentary disposition or intestate succession; and any transfer pursuant to (i) Netherlands Royal Decree of May 24, 1940, and (ii) Norwegian Provisional Decree

of April 22, 1940, concerning the monetary system, etc.

(6) Nothing contained in this general ruling shall be deemed to affect in any way criminal liability for violation of the Order, or the regulations, rulings, circulars, or instructions issued thereunder, or in connection therewith, or to otherwise modify any provision thereof.

By direction of the President.

6. Public Circular No. 31, August 2, 1946, 11 F. R. 8351:

(1) Reference is made to General Ruling No. 12 relating to unlicensed transfers of blocked property. Reference is also made to General Ruling No. 19 relating to the release of Treasury controls over property vested by the Alien Property Custodian. This circular deals with the effect of such release on unlicensed attachments levied with respect to blocked property prior to the vesting thereof by the Custodian.

(2) Under paragraph (1) of General Ruling No. 12, interests in blocked property cannot be acquired, transferred, or created by unlicensed "transfers." Nor may an unlicensed transfer be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any blocked property.

(3) An attachment is a "transfer." See paragraph (5) of General Ruling No. 12 where the term "transfer" is defined as including "the issuance, docketing, filing, or other levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment." An unlicensed attachment, therefore, cannot operate to transfer or create any interest in blocked property. Nor can it serve as a basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any blocked property.

(4) Paragraph (4) of General Ruling No. 12 does not constitute a license authorizing the seizure or creation of any interest in blocked property by attachment proceedings or other legal process. This paragraph merely is a formal statement of the position which the Treasury Department has always taken with respect to litigation affecting blocked property—that it does not desire to interfere with such litigation so long as it is clearly understood that the judicial process cannot, without a license or other authorization from the Secretary of the Treasury, operate to transfer or create any interest in blocked property. Thus, the proviso of paragraph (4) specifies that "no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power,

or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license." In issuing paragraph (4), the Treasury Department did not undertake to decide for the courts whether they should exercise jurisdiction. It simply prescribed that jurisdiction could be exercised only on the basis that if a Treasury license was not issued, the judicial process could not operate to transfer or create any interest in blocked property, nor could it be the basis for the assertion or recognition of any other right, remedy, power, or privilege with respect to the property.

(5) The Treasury Department has always considered that when the Alien Property Custodian has vested any property, it would not be in the national interest for the Treasury Department thereafter to grant licenses authorizing the creation or acquisition of any interest in the property. Formerly it was the practice of the Department, whenever it was notified by the Custodian that a particular property had been vested, to issue a specific release to the Custodian of all control of the property under Executive Orders Nos. 8389 and 9193. Paragraph (1) of General Ruling No. 19 constitutes a general release of such

control in the case of all German and Japanese property vested by the Custodian. Paragraph (2) of the General Ruling is intended to make it clear that a release of control over any vested property to the Alien Property Custodian, whether by specific release or by reason of the General Ruling, operates as a final denial by the Secretary of the Treasury of any pending application for license or other authorization relating to such property and that no application for a license authorizing the creation, acquisition, or transfer of any interest in such property will thereafter be entertained or granted. The paragraph is thus a formal statement of what has always been the position of the Treasury Department—namely, that once blocked property has been vested by the Custodian, there is no longer any possibility that an unlicensed attachment may ripen through the issuance of a Treasury license into a seizure and acquisition of an interest in such blocked property.

(6) In view of the fact that the Alien Property Custodian has publicly announced his intention of vesting all German and Japanese property in the United States, it will be the general policy of the Treasury Department not to grant any licenses authorizing the creation or acquisition through legal process of any interest in blocked German or Japanese property.

7. Press Release No. 34, April 21, 1942, *United States Treasury Department: Documents Pertaining to Foreign Funds Control* (1946), pp. 71-73:

The Treasury Department, in a formal statement issued today, called attention to the fact that all unlicensed transfer of blocked assets in the United States are void and unenforceable.

General Ruling No. 12, issued by the Secretary of the Treasury, makes clear that unlicensed transfers of blocked assets in violation of the freezing orders, and transfers designed or having the effect of evading such orders, always have been void and unenforceable.

Secretary Morgenthau, commenting on today's general ruling, pointed out that these unlicensed transfers of blocked assets always have been void and unenforceable under the freezing orders and that today's ruling serves the purpose of emphasizing this fact for the benefit of any of the public who may have overlooked this aspect of freezing control.

He also called attention to the provisions of the ruling, making it possible for persons who have been parties to unlicensed transfers of blocked assets to file applications for licenses to validate these transfers.

"The Treasury, of course, wants to be reasonable about this matter," he stated. "We do not propose to allow our regulations, intended

for the protection of our country and the United Nations, to become an instrumentality for defeating their interests or producing unconscionable advantages or unreasonable hardships. These matters can be dealt with by licenses, without undue interference with the purposes of freezing control."

Treasury officials pointed out that there are more than 7 billion dollars in blocked assets in the United States. The Government's policy on this matter, as reflected in today's formal ruling, has nullified attempts by the Axis to gain title to the billions of dollars in assets belonging to nationals of the countries overrun by the Axis. It has defeated efforts of the Axis to wrest control of such assets away from their lawful owners and hold them in the hopes that in the postwar period it will be possible to realize on such assets if freezing restrictions are lifted. Of equal significance is the fact that it has destroyed any possible black market in neutral countries for blocked assets—one of the ways the Axis would like to be able to obtain the foreign credit necessary to finance imports from neutral countries into Axis territory and also one of the ways the Axis would like to be able to gain the funds necessary to subsidize espionage, sabotage, and fifth-column activities in the United Nations, Latin America, and elsewhere.

Treasury officials explained that, based on the evidence of what the Axis was doing with assets of the overrun countries within their physical control, Axis efforts in an operation of this character would follow no single pattern. Rather, they would run the gamut from outright duress—assignments at the point of a gun, or with the Gestapo as “witnesses”—through to the more subtle “legal” transfers—the purchase of such blocked assets against payment in local currency obtained as occupation costs or by forced loan from banking institutions in the occupied areas. In these latter cases the point of the gun would not be leveled at the individual, but would be leveled at the central bank and “Quisling” governments who would provide the credit for the Axis to “buy” their country’s birthright.

The net effect of such transfers would not vary however, they would be intended to mulct the overrun countries of the very life-blood of any postwar reconstruction, namely, the foreign exchange needed to obtain the goods and services necessary for rebuilding the economies of these countries. Axis war psychology would be benefited also—by depriving the holders of their title to these assets the Axis would encourage a spirit of defeatism and a willingness to succumb to the German “new order.”

Officials also explained that, based on the operation of the neutral black market in looted assets physically in the control of the Axis, it was easy to anticipate the type of black market the enemy might try to foster for "blocked assets." This neutral blackmarket operation would be designed to give the Axis immediate returns on blocked assets even though the Axis could not get such assets out from under our freezing regulations. In this case the assets would be assigned or otherwise transferred to neutral speculators at heavy discount in order that the Axis could obtain credit now to buy goods and services in neutral countries and thus assist the war effort. Of course some of these blackmarket operations would be for the obvious purpose of lining the pockets of Axis officialdom as insurance against the day when the Axis is crushed. Neutral speculators would either hold such assignments with the intent of salvaging on them after the war or in the hope of being able to squeeze the blocked assets through the freezing control by one trick or another.

As was pointed out, since freezing control makes null and void, or unenforceable all transfers with respect to blocked assets unless licensed by the Secretary of the Treasury, Axis attempts to gain title to these assets are frustrated and the true owner's interests are

protected and he continues to have a valuable stake in a victory by the United Nations.

Commenting upon today's ruling, Secretary Morgenthau stated: "This Government served notice on the world when we froze the assets of Norway and Denmark on April 10, 1940, that we did not intend to permit the Axis to realize any use or benefit from Norwegian and Danish assets in the United States. Since that time we have consistently pursued this policy with respect to every country falling under the Axis yoke. The policy of this Government always has been unequivocal. We will not allow the Axis, directly or indirectly, to gain any interest in the 7 billion dollars in blocked assets in this country. Neither those funds nor any interest in them will be used against the United Nations by the Axis. Neither will they be used as a part of Germany's economic 'new order' in Europe or Japan's 'co-prosperity sphere' in the Pacific."

It was emphasized that, while freezing control attempted to interfere as little as possible with normal legitimate commercial transactions, still the Government was combatting a menace of sweeping proportions and was compelled to block all corrosive efforts of infiltration through loopholes. Freezing control and the Government's policy is therefore comprehensive and the licensing technique must be freely used to prevent hardship in legitimate

cases. Thus, under the freezing orders, more than 80 general licenses have been issued, permitting vast categories of transactions under appropriate safeguards without even filing an application. In addition, more than 400,000 specific licenses also have been issued.

Paragraph (1) of today's general ruling deals with unlicensed transfers made after the effective date of the freezing orders involving property in blocked accounts. If any such transfer was made after the account was actually blocked, then the transfer is null and void unless licensed. Thus, if a bank blocked the account of a national of Denmark on April 10, 1940, and on June 10, 1940, the national attempted to assign title to the account to a German, the transfer would be null and void unless the Treasury licensed it. On the other hand, if a transfer were made before the account was actually blocked, but attempt was made to enforce it while the account was in fact blocked, the transfer would be unenforceable. By way of example: On July 15, 1941, John Doe, resident in Argentina, assigned his account with an American bank to Richard Roe in the United States. On September 15, 1941, the Treasury instructed the bank to block the account of John Doe as a national of Rumania. After September 15, 1941, the assignment would be unenforceable against John

Doe's blocked account unless the transfer were licensed by the Treasury Department.

Paragraph (2) of the general ruling deals with transfers alleged to have been made before the effective date of the freezing orders but involving accounts thereafter blocked. These transfers are unenforceable against blocked accounts unless the person with whom the blocked account was held or maintained had written notice of the transfer or had recognized it in writing prior to the effective date of the Order. Thus, if in the example above, the national of Denmark had assigned the bank account to the German in 1937 and the bank was not notified of the assignment until June 10, 1940, the assignment would be unenforceable against the blocked account unless licensed. If, on the other hand, the bank was notified in writing of the assignment before April 10, 1940, then the assignment is enforceable against the blocked account (but, of course, payment from the blocked account could only be made pursuant to Treasury license).

Treasury officials pointed out that the policy behind paragraph (2) of the general ruling was understandable. If the general ruling had been merely prospective in operation, it would be easy for Axis agents to validate transfers obtained under duress by the subterfuge of dating them prior to the effective date

of the Executive Order. This would, of course, defeat one of the major purposes of freezing control. Officials pointed out that in those cases where notice of the transfer was given to the person maintaining the account in this country and where the transfer had been accepted by that person as valid, the provisions of the general ruling are inapplicable since under those circumstances the notice is an adequate precaution to guarantee that the transfer was made prior to the effective date of freezing control.

Paragraph (3) of the ruling provides that a license issued by the Treasury Department, either before or after a transfer, completely validates the transfer for the purposes of freezing control. Of course, if an assignment would have been invalid without freezing control (e.g., because not properly executed), a Treasury license does not purport to remedy this type of invalidity.

Paragraph (4) is but a formal statement of the position which the Treasury Department has always taken on litigation (including attachments) affecting blocked assets. The Treasury has no desire to limit the bringing of suits in courts within the United States: *Provided*, That no greater interest is created by virtue of the attachment, judgment, etc., than the owner of the blocked account could have voluntarily conferred without a license. Thus,

the Treasury does not want to interfere with the orderly consideration of cases by the courts provided that the results of court proceedings are subject to the same policy consideration from the point of view of freezing control as those arising through voluntary action of the parties.

Paragraph (5) defines various terms employed in the ruling. For example: the term "transfer" is given a very comprehensive meaning, excepting only certain types of transfers by operation of law (e.g., transfer by intestate succession). The term "property" is broad but by and large does not include mere chattels or real property. The term "blocked account" is in effect limited to accounts actually treated as blocked accounts by the person with whom such account is held or maintained.

Paragraph (6) is technical in character and reserves the full right of the Government to prosecute for violations of the freezing orders and emphasizes that General Ruling No. 12 is not intended to modify outstanding freezing orders, regulations, etc.

FEB 21 1951

No. 298, 299, 314, 315, 324

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 298

LEO ZITMAN (WITH WHOM THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK WAS IMPEACHED BELOW), PETITIONER

J. HOWARD MCGRATH, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

No. 299

LEO ZITMAN (WITH WHOM THE FEDERAL RESERVE BANK OF NEW YORK WAS IMPEACHED BELOW), PETITIONER

J. HOWARD MCGRATH, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

No. 314

JOHN F. MCCARTHY (WITH WHOM THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK WAS IMPEACHED BELOW), PETITIONER

J. HOWARD MCGRATH, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

No. 315

JOHN F. MCCARTHY (WITH WHOM THE FEDERAL RESERVE BANK OF NEW YORK WAS IMPEACHED BELOW), PETITIONER

J. HOWARD MCGRATH, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

No. 324

JOHN J. MCCARTHY, AS SHERIFF OF THE CITY OF NEW YORK (WITH WHOM THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, LEO ZITMAN, AND JOHN F. MCCARTHY WERE IMPEACHED BELOW), AND AS SHERIFF OF THE CITY OF NEW YORK (WITH WHOM THE FEDERAL RESERVE BANK OF NEW YORK, LEO ZITMAN, AND JOHN F. MCCARTHY WERE IMPEACHED BELOW), PETITIONER

J. HOWARD MCGRATH, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 298

**LEO ZITTMAN (WITH WHOM THE CHASE NATIONAL
BANK OF THE CITY OF NEW YORK WAS IM-
PLEADED BELOW), PETITIONER**

v.

**J. HOWARD McGRATH, ATTORNEY GENERAL, AS
SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN**

No. 299

**LEO ZITTMAN (WITH WHOM THE FEDERAL RESERVE
BANK OF NEW YORK WAS IMPEADED BELOW);
PETITIONER**

v.

**J. HOWARD McGRATH, ATTORNEY GENERAL, AS
SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN**

No. 314

**JOHN F. MCCARTHY (WITH WHOM THE CHASE
NATIONAL BANK OF THE CITY OF NEW YORK
WAS IMPEADED BELOW), PETITIONER**

v.

**J. HOWARD McGRATH, ATTORNEY GENERAL, AS
SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN**

(1)

No. 315

JOHN F. MCCARTHY (WITH WHOM THE FEDERAL
RESERVE BANK OF NEW YORK WAS IMPEADED
BELOW), PETITIONER

v.

J. HOWARD MCGRATH, ATTORNEY GENERAL, AS
SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

No. 324

JOHN J. MCCLOSKEY, AS SHERIFF OF THE CITY OF
NEW YORK (WITH WHOM THE CHASE NATIONAL
BANK OF THE CITY OF NEW YORK, LEO ZITTMAN,
AND JOHN F. MCCARTHY WERE IMPEADED BE-
LOW), AND AS SHERIFF OF THE CITY OF NEW YORK
(WITH WHOM THE FEDERAL RESERVE BANK OF
NEW YORK, LEO ZITTMAN, AND JOHN F. MCCAR-
THY WERE IMPEADED BELOW), PETITIONER

v.

J. HOWARD MCGRATH, ATTORNEY GENERAL, AS
SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court for the
Southern District of New York (R. 71), is re-
ported at 82 F. Supp. 740. The *per curiam* opin-
ion of the Court of Appeals for the Second Circuit
(R. 150) is reported at 182 F. 2d 349.

JURISDICTION

The judgments of the Court of Appeals were entered on June 2, 1950 (R. 151-152). Petitions for rehearing were denied on June 27, 1950 (R. 153). Petitions for writs of certiorari were filed on September 9 (Nos. 298, 299), September 19 (Nos. 314, 315), and September 20, 1950 (No. 324), and were granted on November 13, 1950 (R. 155-157). The jurisdiction of this Court rests on 28 U. S. C. 1254.

QUESTIONS PRESENTED

These proceedings were instituted by the respondent to obtain a declaration that he is entitled, under vesting orders issued by the Alien Property Custodian, to the entire balances remaining in certain accounts maintained by two German nationals with two New York banks. Respondent also sought a declaration that federal foreign funds control or "freezing" regulations had prevented two attaching creditors and the sheriff from obtaining liens upon, or other property interests in, the accounts by means of writs of attachment obtained in the courts of New York subsequent to the freeze date but prior to the vesting. The following questions are presented:

1. Whether the court below erred in holding that, absent a license, no interest in blocked property could pass under a post-freezing attachment.
2. Whether the court below erred in holding that the Secretary of the Treasury did not in

fact grant a general license authorizing the acquisition of interests in blocked property by means of attachments.

3. Whether the court below erred in holding that the federal court was a proper forum for determining respondent's rights under the vesting orders issued by the Alien Property Custodian.¹

STATUTE, EXECUTIVE ORDER, AND REGULATIONS INVOLVED

The pertinent provisions of the Trading With the Enemy Act, 40 Stat. 411, as amended, 50 U. S. C. App. § 1 *et seq.*, and orders and regulations issued thereunder are set forth in the Appendix, *infra*, pp. 55-82.

STATEMENT

Respondent, successor to the Alien Property Custodian,² instituted two actions in the United

¹ In addition to the above, which are presented in all five cases, a further question is presented in Nos. 299 and 315, and as to part of the amount involved in No. 324, namely: Whether the Custodian is, in any event, entitled to summary possession of the amount demanded in his turnover directive. Because the court below did not reach this question, and we do not believe it will be necessary for this Court to reach it, we shall discuss it only summarily herein. See p. 13, n. 9, *infra*.

² By Executive Order No. 9788 (October 14, 1946, 11 F. R. 11981) the Attorney General succeeded to the powers and duties of the Alien Property Custodian. In this brief, the terms "Alien Property Custodian" or "Custodian" will be used, as the context may require, to refer either to the Alien Property Custodian or to the Attorney General as his successor.

States District Court for the Southern District of New York. Both were brought pursuant to Section 17 of the Trading With the Enemy Act and the Federal Declaratory Judgment Act. One was filed against the Chase National Bank of the City of New York and petitioners Zittman, McCarthy and McCloskey (R. 2); the other against the Federal Reserve Bank of New York and the same three petitioners (R. 82). The facts upon which the cases were submitted appear from the pleadings (R. 2-62, 82-132), as supplemented by stipulations between the parties (R. 62-70, 133-139).

By vesting orders executed in October 1946 the Custodian vested the obligations arising out of certain dollar accounts maintained by the Deutsche Reichsbank and the Deutsche Golddiskontbank with the Chase and Federal Reserve Banks in New York, including all rights to demand, enforce and collect the same¹ (R. 9, 14, 88). The vesting order addressed to the obligations of the Federal Reserve Bank was implemented, the same month, by a turnover directive which found that the principal amount of \$1,003,382.78 constituted "property that was vested * * * by the said vesting order" and demanded that this sum, together with all accumulations thereon, be surrendered forthwith to

¹ The Custodian's vesting authority rests upon Section 5 (b) of the Trading With the Enemy Act and Executive Order No. 9193 (July 6, 1942, 7 F. R. 5205).

the Custodian (R. 93-95). No turnover directive was addressed to Chase,⁴ but the vesting orders pertaining to its obligations were served upon it with a demand for compliance (R. 11, 16).

Federal Reserve complied with the Custodian's turnover directive to the extent of remitting \$703,382.78. It retained \$300,000 in its Reichsbank account, however, on the ground that it was required to do so by writs of attachment which had been served upon it (R. 97-101). Chase declined to surrender any of the property embraced by the Custodian's orders, asserting that it had been served with writs attaching its Reichsbank and Golddiskontbank accounts (R. 18-22). Both banks expressed readiness to comply in full with the Custodian's vesting orders if the writs of attachment which had been served upon them were vacated (R. 20, 22, 61-62, 98).

The writs involved were procured by the petitioners Zittman and McCarthy in actions which they commenced against the Deutsche Reichsbank and the Deutsche Golddiskontbank in the Supreme Court of New York, Kings County, on December 11, 1941, and January 20, 1942 (R. 40, 48, 117, 126). Default judgments were subsequently entered in those actions following service by publication (R. 42, 50, 117, 127-128). More than six months prior to the commencement of those actions all German-owned property located in this

⁴ This is the only particular in which there is a significant difference between the two cases.

country had been frozen (Section 5 (b) of the Trading With the Enemy Act; Executive Order No. 8389, April 10, 1940, 5 F. R. 1400, as amended by Executive Order No. 8785, June 14, 1941, 6 F. R. 2897). Petitioners never obtained a license from the Treasury authorizing them to acquire interests in the bank accounts in question or to satisfy their judgments out of them (R. 5, 8-9, 39, 47, 84-85, 87-88, 118, 125).⁵ Accordingly, there has been no execution on the judgments (R. 5, 39, 47, 85, 118, 125).

It was stipulated by the parties that the Treasury Department, in administering the freezing controls, advised persons who made inquiry concerning the possibility of securing adjudication of their rights *vis-a-vis* owners of blocked property, that the regulations did not in any way forbid the bringing of suits in the courts or the resort to judicial process (including writs of attachment), but that a license was required before a judgment obtained in any suit could be satisfied out of blocked property. It was also stipulated that on various occasions the Treasury Department has specifically licensed payments from blocked accounts in satisfaction of judgments obtained against blocked nationals in suits instituted by attachment (R. 62-70, 133-139).

Petitioners Zittman and McCarthy contested respondent's claim that he is entitled to the

⁵ Petitioner McCarthy filed applications for licenses which were denied (R. 9, 40, 87-88, 118).

money held in the accounts, on the ground that their attachments gave them antecedent property rights in those accounts superior to those which the Custodian took under his vesting orders (R. 44, 52, 122, 129). Petitioner McCloskey adopted these contentions and also urged that, if the court should find respondent entitled to the property in issue, it should nonetheless provide for payment to him of poundage fees (R. 55, 132).

The District Court held that all German-owned property having a situs in this country was effectively frozen on June 14, 1941; that "judicial process cannot, without a license or other authorization from the Secretary [of the Treasury], create any interest in blocked property"; and that no such authorization was in fact granted. It also held that the sheriff's claim for poundage necessarily fails because no interest in the blocked property passed under the attachments. It accordingly declared respondent entitled to the entire balances remaining in the vested accounts (R. 71-75).

The Court of Appeals affirmed as to petitioners Zittman and McCarthy on the authority of *Propper v. Clark*, 337 U. S. 472, and as to petitioner McCloskey on the ground stated by the District Judge (R. 151). After decision by this Court in the case of *Lyon v. Singer*, 339 U. S. 841, petitioners applied for a rehearing. Their applications were denied (R. 153).

SUMMARY OF ARGUMENT

Effective June 14, 1941, transfers of interests in the German bank accounts maintained with Chase and Federal Reserve were prohibited (except as licensed) by the express terms of the freeze order, Executive Order No. 8389. Petitioners could not thereafter acquire a property interest in the blocked accounts which could prevail against a subsequent vesting by the Custodian. That was the holding of this Court in *Propper v. Clark*, 337 U. S. 472, where the creditor of a blocked national proceeded by securing a state court appointment of a permanent receiver. The logic of that decision required the holding below that these petitioners, also creditors, could no more prevail where they proceeded by the parallel avenue of attachment. Nothing in this Court's decision in *Lyon v. Singer*, 339 U. S. 841, purports to qualify or limit the *Propper* decision. On the contrary this Court affirmed the decision of the New York court in *Singer* only because it did not construe that decision as impairing "the Custodian's paramount power to vest" (339 U. S. at 843).

The *Propper* case also established that certain general rulings and regulations of the federal authorities, declaring that parties were free to seek adjudication of their rights *vis-a-vis* blocked nationals, could not be regarded as authorizing the courts to effect unlicensed transfers of blocked

property. The Treasury position on proceedings by attachment was the same: that they were not as such prohibited, but that any transfer of a proprietary interest pursuant to such a proceeding was conditional upon a license releasing the property from the federally-imposed freeze. Petitioners' contention that certain informal communications by the Secretary of the Treasury amounted to a general license authorizing the acquisition of rights *in rem* by unlicensed attachment is groundless. No license was issued petitioners and none may be inferred.

*Propper*³ is likewise decisive on the proposition that the federal courts have jurisdiction to declare the Custodian's rights under a vesting order, irrespective of the fact that a state court has previously entertained creditor's proceedings against the blocked national who then owned the property involved.

ARGUMENT

I. EXECUTIVE ORDER NO. 8389 PREVENTED THE ACQUISITION, AFTER JUNE 14, 1941, OF ANY PROPRIETARY INTEREST IN THE BANK ACCOUNTS OF THE GERMAN NATIONALS

A. THE TERMS OF THE ORDER

Executive Order No. 8389, as amended,⁶ provides:

⁶ The President's authority to issue the Order rests upon Section 5 (b) of the Trading With the Enemy Act, as amended by the Joint Resolution of May 7, 1940 (54 Stat. 179), and as further amended by the First War Powers Act of 1941, Section 301 (55 Stat. 839).

SECTION 1. All of the following transactions are *prohibited*, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise if * * * such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States * * *;

B. All payments by or to any banking institution within the United States; . . .

E. All *transfers*, withdrawals, or exportations of, or *dealings in*, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions. [*Italics added.*]

The Order became effective as to German property in this country as of June 14, 1941 (Executive Order No. 8785, 6 F. R. 2897). Petitioners recognize that they cannot be paid out of the blocked accounts without a license; they nonethe-

There is no dispute that the Reichsbank and the Gold-diskontbank are banks organized under the laws of Germany and are nationals within the ambit of the Order.

less contend that they were free to acquire, by means of their unlicensed attachments, an interest in the blocked property and, *pro tanto*, to defeat the possibility of its seizure by the Custodian as enemy property. Section 1E of the Order makes it plain, however, that its prohibitions were directed not merely against payments out of blocked funds but against any transfer of interest in blocked property. The proscription is against "all transfers, * * * of, or dealings in, any evidences of indebtedness or evidences of ownership of property." Whether the blocked accounts here involved be considered as trust funds for the benefit of the Reichsbank and the Golddiskontbank or whether only the usual debtor-creditor relationship was created by the deposits, it is plain that the accounts fall within the description "evidences of indebtedness or evidences of ownership of property." Any attempts, therefore, by the petitioners to acquire an interest in the accounts by the writs of attachment necessarily constituted acts of "transfer" or "dealing in" such evidences of indebtedness or ownership and required a license.*

* Subparagraph A prohibiting "transfers of credit between * * * banking institutions" is also applicable. Since "banking institution" is defined in Section 5F of the Order as including "any person holding credits for others as a direct or incidental part of his business" (App. p. 67), it comprehends the sheriff as well as the Chase and Federal Reserve Banks. Cf. *Propper v. Clark*, 337 U. S. at pp. 480-482.

B. AS WAS HELD IN *PROPPER v. CLARK*, THE PROHIBITIONS OF THE ORDER EXTEND TO ATTEMPTED TRANSFERS BY MEANS OF JUDICIAL PROCESS

Petitioners stress that nothing in the Trading With the Enemy Act or in the freezing regulations prohibits the bringing of suits against enemy nationals in time of war. This is correct. Indeed, the Treasury Department in administering the controls took the position from the outset that parties were free to seek adjudications of their rights *vis-a-vis* blocked nationals. This does not alter the fact, however, that transfers of interests in property subject to the controls may not be effected without a license and that it is immaterial whether the attempted transfer is by voluntary assignment or by means of judicial process. That the prohibitions go to both categories of transfers was squarely decided by this Court in *Propper v. Clark*, *supra*. The courts below were clearly correct in holding that decision dispositive of the present litigation.*

* We believe that there is an additional ground, not discussed by the court below, for upholding the respondent's position in the cases involving the Federal Reserve accounts (Nos. 299, 315, and part of No. 324). Since the Act does not specify that the Custodian's findings must take a particular form, the turnover directive addressed to Federal Reserve, finding that a specific sum was enemy property, must be read in conjunction with the vesting order in determining what the Custodian proposed to seize. *In re Yokohama Specie Bank, Ltd.*, 188 Misc. 137, 141, 66 N. Y. S. 2d 289, 293. So read, it is apparent that the Custodian did not vest an indeterminate interest in the Federal Reserve accounts, leaving open for judicial determination the *quantum* of that interest,

In *Propper*, the Custodian sought a declaration that he was entitled under a vesting order to funds held by an American Society (ASCAP) for an Austrian national. He also sought a declaration that a permanent receiver appointed subsequent to freezing by a New York court pursuant to a New York judgment, for the purpose of receiving and reducing to possession the local assets of the Austrian national, acquired no interest in the blocked property held by ASCAP, in the absence of a federal license. It was conceded that, had there been no freezing controls in effect, the permanent receiver would have taken title to the property.

The parallel between *Propper* and the instant cases is obvious. In both, New York claimants,

but rather vested a specific *res*. Where he vests a described *res*, the Custodian is clearly entitled to immediate possession (*Silesian-American Corp. v. Clark*, 332 U. S. 469; *Commercial Trust Co. v. Miller*, 262 U. S. 51; *Central Union Trust Co. v. Garvan*, 254 U. S. 554). This rule applies even though the *res* which is vested is regarded merely as a debt owing to an enemy, at least where, as here (*supra* p. 56), the debtor does not dispute the existence and amount of the debt. *McGrath v. Manufacturers Trust Co.*, 338 U. S. 241. The only remedy of a non-enemy claiming an interest in the property is by suit under Section 9 (a) (*ibid.*).

Since the court below determined that these petitioners could not have acquired any interest in either the Chase or Federal Reserve accounts because of the impact of freezing, it did not find it necessary to consider the difference between the character of the vestings in the two cases. Similarly, it will be necessary for this Court to consider that question only if it should conclude that the court below erred as to the Chase accounts.

proceeding under New York law, sought to realize on the local assets of enemy nationals. In both, they availed themselves of provisional remedies and obtained default judgments in proceedings grounded on substituted service. In both, they contended that New York's judicial process had given them an interest in the property itself which prevented the Custodian from taking it under a vesting order. And in both, the process upon which they relied had been issued after the freeze date and without a federal license. In *Propper*, as here, it was contended by the petitioner that the freezing prohibitions did not prevent transfer of an interest in the property, but only purported to screen *payments* by means of a licensing system. This argument was flatly rejected by the Court of Appeals for the Second Circuit, which stated [169 F. 2d 324, 327]:

The language of Exec. Order 8389 prohibits the unlicensed transfer of an enemy alien's property. There is no cogent reason for excepting transfers by judicial process. To allow the exception would be to furnish a means of evasion by which the impact of freezing controls could be avoided by recourse to judicial proceedings. Such would negate the executive and legislative intention.

Affirming that decision, this Court declared [337 U. S. at pp. 480, 486]:

The Executive Order of June 14, 1941
* * * specified the prohibited transac-

tions * * * by categories so all-inclusive as to make it clear that the purpose was to require transactions involving property of nationals of designated foreign countries to be carried out under regulations of this Government, except certain transactions such as are provided for in General Ruling No. 12, April 21, 1942, 7 Fed. Reg. 2991. * * *

* * * * *

It is our conclusion that the Joint Resolution of May 7, 1940, and the Executive Order of April 10, 1940, put into effect a valid plan for control of the property covered by the regulation that prohibited any change of title to that property by reason of the subsequent appointment of petitioner as permanent receiver. We do not now undertake to say whether every determination of rights concerning blocked property in unlicensed litigation is voidable. We base our determination on the purpose of Congress to prevent shifts in title to blocked assets and the prohibition of the Executive Order against transfers of such a credit as this. The language of the order prohibits more than payment. It prohibits transfers of credit: * * *

It is argued that *Propper* is distinguishable because the issue there was whether the receiver took title, whereas the issue here is whether petitioners acquired fixed liens on the blocked property. The attempted distinction is entirely without substance. On the face of it, it is little short

of absurd to suggest that, while creditors of an enemy national are precluded from reaching his blocked property in the absence of a license where they proceed by the provisional remedy of receivership, the opposite result will be permitted where they follow the provisional remedy of attachment. Certainly there is nothing in the language of the freeze order, in the purposes of the controls, or in the rationale of the *Propper* decision that would countenance such a paradoxical result.

As emphasized above, the freeze order "prohibits more than payment"; it prohibits all unlicensed "transfers * * * or dealings in" blocked property (§ 1E), and "any transaction * * * which has the effect of evading or avoiding the foregoing prohibitions" (§ 1F). To hold that one could transfer valuable rights in blocked property so long as title did not pass—that one could remove the meat so long as the shell remained—would ignore the plain mandate of the Order.

It would also defeat the basic purposes of the controls. A primary objective of freezing was to prevent the Axis countries from drawing sustenance from property within the jurisdiction of the United States (cf. *Propper v. Clark, supra* at p. 481). It was recognized that if only payments out of blocked property were proscribed it would be a simple matter for the aggressor nations to sell interests in blocked property (either those of

their own nationals or those owned by nationals of the invaded countries) to friendly speculators willing to buy at a discount and to await payment on the ultimate day of unblocking. See 86 Cong. Rec. 5006-08, 5168-83; H. Rep. 1507, 77th Cong., 1st Sess., p. 3; S. Rep. 911, 77th Cong., 1st Sess., p. 2.

To hold that *any* interest in blocked property may pass without a license would be destructive of this aim. The possibility of assigning interests by attachments furnishes one illustration. Suppose the case of a German national who had a million dollars in New York at the time the freeze went into effect. If a non-enemy speculator could, without a federal license, acquire an indefeasible lien on that property by the simple expedient of filing a complaint, fictitious or otherwise, procuring a writ of garnishment or attachment, and then obtaining a default or confessed judgment, can it be doubted that he might be willing to pay the German handsomely with "free" money for the privilege?¹⁰ Yet, that was the very kind of transaction freezing was designed to make unprofitable.¹¹

¹⁰ This illustration is designed to show the dangers to the freezing program implicit in petitioners' theory. No implication is intended that there was any impropriety in connection with the actions which these petitioners brought against the Reichsbank and the Golddiskontbank.

¹¹ Another illustration of the evils to which petitioners' theory leads is provided by the case of a pledge. Suppose that a German national owned General Motors stock when freezing went into effect. Petitioners would agree that he

A second, closely related, objective of the program was to preserve blocked enemy property for possible future vesting and for such disposition as might ultimately be decided upon. The policies to be adopted by the United States with respect to the disposition of enemy property were not determined until some years after our entry into the war. The first step in fixing those policies was made in the Paris Agreement on Reparations from Germany, effective January 24, 1946, 61 Stat. 3157, to which the United States and seventeen other nations are signatories. Article 6A provides that each signatory shall hold or dispose of German enemy assets within its jurisdiction so as to preclude their return to German ownership or control, and shall charge such assets against its share of reparations from Germany. Thereafter, in the War Claims Act of 1948, 62 Stat. 1240, Congress provided that German and Japanese property vested by the American Custodian shall not be returned to its former owners (§ 12), and that the proceeds of such property remaining after administration under the Trading With the Enemy Act shall be covered into a

could not thereafter divest himself of title. But apparently they would say that he could hypothecate or pledge the stock to a neutral as security for a loan, and at one stroke obtain an economic benefit and insulate the property from this country's vesting power. To hold, in the face of a prohibition against "all transfers * * * or dealings in" blocked property, that such a transaction could create an indefeasible interest in the pledgee would be unthinkable.

War Claims Fund (§§ 12, 13 (a)), to be used to provide compensation to American victims of Axis aggression (§§ 4-8). Pending these determinations, it was plainly necessary to immobilize all enemy property to insure that whatever policies might ultimately be adopted could be applied to it. See Reeves, *Control of Foreign Funds by the United States Treasury*, 11 Law and Contemporary Problems 17, 29-30 (1945). Obviously, to permit non-enemies, without a federal license, to acquire indefeasible rights of any kind in enemy property would, *pro tanto*, destroy its subsequent availability to our Government as reparations and to those war claimants for whom Congress sought to provide compensation.

Accordingly, this Court, in *Propper v. Clark*, *supra*, at p. 484, recognized that a major purpose of the freezing program was to keep enemy property intact "until the Government could determine whether those assets were needed for prosecution of the threatened war or to compensate our citizens or ourselves for the damages done by the governments of the nationals affected." Petitioners state that in *Propper* the Court was addressing itself only to transfers of title. It is true that that was the kind of transfer there presented. It can scarcely be supposed, however, that transfers of lesser property interests stand on any different footing. Indeed the Court spoke, more generally, of "transfers of credit" as prohibited (p. 486). It is unmistakably plain that

to allow the creation of an indefeasible lien on blocked property would frustrate *pro tanto* the purpose of preserving it for possible future vesting and ultimate disposition in accordance with the policy of Congress just as effectively as would an unauthorized assignment of title. This case proves the point. These petitioners are seeking to resist the claim of the Custodian to take property that was admittedly enemy-owned on June 14, 1941, and they rely solely on liens which they claim to have acquired subsequent to that date and which they assert to be indefeasible.

Still another purpose in preventing unlicensed transfers of enemy property was the protection of *all* United States citizens having claims against enemy nationals. The importance of this aspect of freezing was stressed in 1940 when Congress, by a Joint Resolution,¹² first ratified the freeze order. See remarks of Senator Barkley, 86 Cong. Rec. 5006. And it was emphasized by this Court in *Propper* that a primary purpose in immobilizing enemy property was to hold it available for future compensation of "our citizens or ourselves" (337 U. S. at p. 484).

This objective was carefully implemented in 1946 by the addition to the Trading With the Enemy Act of Section 34, which establishes a complete scheme for the satisfaction of American nationals to whom the former owners of vested

¹² Joint Resolution of May 7, 1940, 54 Stat. 179.

property were indebted. That Section provides that vested property held by the Custodian shall be "equitably applied" to debts owed by the pre-vesting owner to American citizens or residents (§ 34 (a)). It further declares that no debt claim is to be allowed "if it arose from any action or transaction prohibited by or pursuant to this Act and not licensed or otherwise authorized pursuant thereto * * *." In cases where the aggregate of valid debt claims against a particular debtor exceeds his vested assets, the Custodian is directed to make a *pro rata* allocation (§ 34 (f)). While the Section provides for certain priorities (§ 34 (g)), *e. g.*, wage and salary claims, it grants none to persons who obtained unlicensed writs of attachment against the property later vested. To interpret Executive Order No. 8389, therefore, as permitting a transfer of property to one creditor by unlicensed attachment or judgment would be a manifest contradiction of the fixed intent of Congress to treat all creditors alike.¹³

It should also be stressed that the remedies under Section 34 are available only to American nationals. That foreign creditors should "ad-

¹³ Absent special equities, the consistent policy of the Custodian has been to deny licenses to individual creditors of *enemy* debtors and to process the claims of all in accordance with the procedures established by Congress in Section 34. In cases involving *friendly* alien debtors whose property was blocked for preventive reasons, *i. e.*, to forestall looting and forced transfers abroad, licenses to established creditors have generally been granted.

dress themselves to [enemy] property" located in their own countries was the carefully considered decision of the Congress. S. Rep. No. 1839, 79th Cong., 2d Sess., p. 5; H. Rep. No. 2398, 79th Cong., 2d Sess., p. 11." But, if petitioners' thesis is accepted, numerous foreign creditors of German and Japanese nationals will be in a position to deplete the funds which Congress provided should be used exclusively for American creditors and American war claimants. Foreign creditors have followed the same course as did petitioners Zittman and McCarthy. Coming into American state courts, either directly or through assignees for the purpose of suit, they have secured the issuance of writs of attachment directed against blocked property located in this country. Thus, in the case of *Murphy v. I. G. Farbenindustrie A. G.* (Sup. Ct., N. Y. County, Index No. 11346/1941) the representative of an English creditor of the defendant German company attached some \$294,000 of blocked Farben funds located in New York and thereupon obtained a default judgment. These Farben assets were later vested by the Custodian on behalf of the United States. Plaintiff was denied a license, but, like these petitioners, he persists in the con-

¹¹ Cf. *United States v. Pink*, 315 U. S. 203, 228:

"There is no Constitutional reason why this Government need act as the collection agent for nationals of other countries when it takes steps to protect itself or its own nationals on external debts."

tention that by his attachment he acquired rights superior to the Custodian's. Other foreign creditors make the same claim. The answer, as this Court stated in *Propper*, is that freezing was plainly designed to hold all transfers in abeyance until they could be scrutinized in the light of national policy as ultimately determined and declared by the Congress and the Executive.

Apparently recognizing that there is no real escape from the logic of the *Propper* decision, petitioners argue that the court below erred in choosing *Propper v. Clark* as its guide instead of the decision in *Lynn v. Singer*, 339 U. S. 841. As this Court explicitly pointed out, however, in its opinion in *Singer*, there is no disparity in the results reached in those two cases. Indeed, it was only because this Court found the New York Court of Appeals' holding in *Singer* consistent with *Propper* and with the purposes of the freezing and vesting programs that it affirmed the judgment in that case.

The question raised by *Singer* was whether a plaintiff was entitled under Section 606 (4) of the New York Banking Law to status as a preferred creditor with respect to the assets of a Japanese corporation held by the New York Superintendent of Banks as a statutory liquidator. To establish preferred status under the Banking Law plaintiff had to show that his claim arose out of a transaction with the New York agency of the Japanese corporation. The New

York Court of Appeals found that he had made the requisite showing although the pertinent transaction had taken place after freezing and had not been licensed. On the freezing issue the court stated that "a survey of the underlying facts leaves no doubt that plaintiff's claim rests upon a transaction which was subject to the licensing requirements" (299 N. Y. 113, 118, 85 N. E. 2d 894, 895), observing further that "the consistent design of [the freezing] program is to prevent the fruits of prohibited transactions from being harvested until the underlying dealings are screened and found to be consonant with the national interests" (299 N. Y. at p. 125, 85 N. E. 2d at p. 899). The court concluded that plaintiff had preferred status as a matter of New York law but held that payment to him was "conditional upon his obtaining a Treasury license" (299 N. Y. at p. 120, 85 N. E. 2d at p. 896). Because this Court affirmed the New York decision, petitioners here would argue that indefeasible interests in blocked property may be created by post-freezing transactions and that only payment is interdicted.

This position is absolutely untenable in the face of this Court's opinion in *Singer*. This Court construed the opinion of the New York Court of Appeals as holding that under New York law "the transactions gave rise to a preferred claim in the liquidation, but that payment by the liquidator must await specific licensing by the

Alien Property Custodian of the *transactions underlying the claims.*" [Emphasis added.]¹⁵ The opinion thus unmistakably affirms the principle that a post-freezing act cannot operate to transfer interests in blocked property unless and until a license is granted. This is underscored by the language of the opinion which followed (339 U. S. at 842-843):

Since the New York court conditioned enforcement of the claims upon licensing by the Alien Property Custodian, federal control over alien property remains undiminished. Our decision in *Propper v. Clark*, 337 U. S. 472, does not require a contrary conclusion. There the liquidator claimed title to frozen assets adversely to the Custodian, and sought to deny the Custodian's paramount power to vest the alien property in the United States. No such result follows from the New York court's judgments in the present cases.

The result which this Court stated did *not* follow from the *Singer* decision is the one which petitioners are urging here. They claim "adversely to the Custodian", seeking to deny, on the basis of post-freezing transactions, that the Custodian is entitled to take enemy property

¹⁵ In the instant case, "the transactions underlying the claims" are the post-freezing attachments. It is to be emphasized that the petitioners are here claiming *in rem* rights, and that claim alone is in dispute. Their right to assert debt claims against the vested assets under Section 34 of the Act is not in issue here.

which had been frozen by previous order of the President. Their very purpose in this litigation is to resist the effective assertion of "federal control over alien property."

Petitioners also state that the Custodian did not vest the *res* in the instant cases (which is true so far as the Chase accounts are concerned¹⁶) and argue that the vesting power is, therefore, not in issue. It is true that where the Custodian vests the enemy interest in designated property and leaves open for judicial determination the existence of any adverse interest in that property (which is the exact course that was followed in *Propper*¹⁷), the power to take immediate possession by summary seizure is not in issue. But there is no question that in a proceeding brought to enforce an "interest" vesting, the Custodian is entitled to take the total enemy interest as determined by the court. As held in *Propper*, that means the total enemy interest as it existed on the date of freezing, save to the extent that subsequent transfers were licensed. The reach of the Custodian's vesting is in issue here in exactly the same way as it was in *Propper*. And to accord him anything less than the total enemy in-

¹⁶ With reference to the Federal Reserve accounts, see note 9, *supra*.

¹⁷ The vesting order involved in *Propper* (No. 2097; 8 F. R. 16463) was of the "right, title and interest" variety. And the Custodian there sought a declaration from the court that the receiver had no "right, title or interest in the claim in question," 337 U. S. at p. 475.

terest as it stood on the freeze date would, in the words of this Court, "deny the * * * paramount power to vest * * * alien property in the United States."

C. PETITIONERS WERE NOT LICENSED OR OTHERWISE RELIEVED FROM THE EFFECTS OF THE FREEZING AND VESTING PROGRAMS

Petitioners make the additional contention that, whatever the scope of the Executive Order, the Secretary of the Treasury relieved them from the effect of its prohibitions and authorized the acquisition of the property interests to which they lay claim. They concede that no specific license was granted them but urge that a general authorization is to be inferred. They point to the agreed fact that suits against blocked nationals were not prohibited by the terms of the Trading With the Enemy Act or the freezing regulations issued thereunder. They refer also to respondent's stipulation that prospective litigants who applied for a license prior to commencing an attachment action (petitioners, themselves, made no such application) received a reply of the following nature (R. 66):

Under Executive Order No. 8389, as amended, and the Regulations issued thereunder, no attempt is made to limit the bringing of suits in the courts of the United States or of any of the States. However, should you secure a judgment against one of the parties referred to in your letter, which is a country covered by the Order, or a national thereof, a license

would have to be secured before payment could be made from accounts in banking institutions within the United States in the name of such country or national.

This, petitioners state, reflects an intention to screen payment, but not to forbid the acquisition of an interest. Apart from the fact that this capsule statement should not be taken as a complete formulation of the Treasury position (which is set out fully in the General Rulings and Regulations discussed *infra*), we take issue with this construction. If the Treasury had been concerned merely with preventing payments to persons within the orbit of Axis control, doubtless it would have assured the license applicant that payment of any judgment he might obtain would be licensed as a matter of course upon a showing that he, himself, was not a blocked national—a matter very readily ascertainable. But the Treasury offered no assurance whatever that a license would be issued to any applicant. It reserved that question. Its concern, as is apparent, was that the existing ownership was alien. Being alien property, its release or other disposition was to be determined in the light of future events and in accordance with evolving national policies. Fairly construed, the letter means that prospective litigants were deemed free to resort to judicial process (as, also, conceded by the Government in *Propper*), but that the property itself

continued subject to overriding federal controls upon "all transfers."

To this it should be added that the letter does not purport to be a release or a license, and that no such letter was in any event sent to any of these petitioners. But having construed it, first, as implying a waiver of the categorical prohibition of the freeze order against "all transfers," petitioners next proceed to the conclusion that it constituted a general authorization to the world at large to acquire indefeasible interests in blocked property by means of securing writs in the state courts. We submit that this attempt to imply a license is utterly unwarranted. Derogations from the prohibitions of a law are not to be implied in the absence of a clear expression of intent to create an exception. *Yu Cong Eng v. Trinidad*, 271 U. S. 500, 518-519; *Spokane & Inland R. R. v. United States*, 241 U. S. 344, 350. We reiterate that the Treasury's only purpose was to inform the prospective litigant that he was not precluded from bringing suit, but that the prospect of harvesting the fruits of litigation depended upon whether the federal authorities ultimately decided to unfreeze the property. If the Treasury had ever intended to authorize generally the acquisition of fixed liens or other indefeasible interests in blocked property (a step which was, in point of fact, irreconcilable with its basic objectives), it presumably would have done so by its usual practice of issuing a General

License and publishing it in the Federal Register and the Code of Federal Regulations.¹⁸ It did no such thing. On the contrary, every public pronouncement which it has issued on the subject proves conclusively that its intention was otherwise.

United States Treasury Department General Ruling No. 12 (April 21, 1942, 7 F. R. 2991), issued "by direction of the President", provides in part:

(1) Unless licensed or otherwise authorized by the Secretary of the Treasury, (a) any transfer after the effective date of the Order [Executive Order No. 8389] is *null and void* to the extent that it is (or was) a transfer of any property in a blocked account at the time of such transfer;

* * * * *

(5) For the purposes of this general ruling:

(a) The term "transfer" shall mean any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent, or effect of which is to create, surrender, release, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property and without limitation upon the foregoing

¹⁸ Ninety-seven such licenses have been published to date. See Code of Federal Regulations, 1949 ed., Title 8, c. II, § 511.

shall include the * * * *creation or transfer of any lien; the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution or other judicial or administrative process or order, or the service of any garnishment; * * ** [Italics added.]

This Ruling was declaratory of the Order. In the accompanying press release (Press Release No. 34, U. S. Treasury Dept., *Documents Pertaining to Foreign Funds Control* (1946), pp. 71-73, App. pp. 75, 82-83), the Secretary of the Treasury pointed out:

*Unlicensed transfers of blocked assets always have been void and unenforceable under the freezing orders and * * ** [General Ruling No. 12] serves the purpose of emphasizing this fact for the benefit of any of the public who may have overlooked this aspect of freezing control. * * * The term "transfer" is given a very comprehensive meaning, excepting only certain types of transfers by operation of law (e. g., transfer by intestate succession). [Italics added.]¹⁹

¹⁹ While General Ruling No. 12 was published subsequent to the time that the writs of attachment here involved were issued, that Ruling is a statement of the Treasury position as adopted from the inception of freezing. In *Propper*, also, the petitioner's appointment as permanent receiver antedated publication of the Ruling. The Ruling was declared "useful" as a statement of the position taken in the administration of the controls. 337 U. S. at pp. 485-486. It certainly indicates here that Treasury never intended to create the exception which petitioners would infer.

The provisions of paragraph 4 of General Ruling No. 12 did not alter this prohibition against the transfer of interests by attachments, levies, or other judicial process. Paragraph 4 reads:

(4) Any transfer affected by the Order and/or this general ruling and involved in, or arising out of, any action or proceeding in any Court within the United States shall, so far as affected by the Order and/or this general ruling, be valid and enforceable for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated: *Provided, however,* That no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license.

The proviso distinctly states that no judicial process shall confer or create a greater interest in any property in a blocked account than the owner of the property could create or confer by voluntary act without a license. Obviously, under the other provisions of Executive Order No. 8389 and General Ruling No. 12 an attempted voluntary assignment by the Reichsbank or the Golddiskontbank would have been ineffective to pass any interest in the blocked property. In short, while paragraph 4 makes it plain that the Treasury did

not impose an absolute prohibition on litigation relating to blocked property or on the use of such property as a basis for the exercise of jurisdiction over its nonresident owner, it also clearly specifies the limits beyond which the courts might not go. The paragraph is clearly *not* a consent to the acquisition, as the result of judicial action, of any interest in blocked property. It permits judicial action only to the extent that such action is possible without transferring an interest in blocked property, or otherwise effectuating a transaction prohibited by the Order. The press release contemporaneously issued (Press Release No. 34, *supra*) emphasizes the same point:

Paragraph (4) is but a formal statement of the position which the Treasury Department has always taken on litigation (including attachments) affecting blocked assets. The Treasury has no desire to limit the bringing of suits in courts within the United States: *Provided*, That no greater interest is created by virtue of the attachment, judgment, etc., than the owner of the blocked account could have voluntarily conferred without a license. Thus, the Treasury does not want to interfere with the orderly consideration of cases by the courts provided that the results of court proceedings are subject to the same policy consideration from the point of view of freezing control as those arising through voluntary action of the parties.

It may be noted parenthetically that the pressure of wartime business inevitably compelled the Treasury to postpone final action on many license applications. In the fiscal year 1940-1941, 170,000 applications for licenses to engage in designated transactions were filed (*Annual Report of the Secretary of the Treasury, 1941*, p. 219); in 1941-1942, 330,747 (*id.*, 1942, pp. 159-160). The fact, however, that the Treasury was unable in many instances to decide promptly the ultimate licensing question—a decision apt to involve both the sifting of facts and circumstances and determinations of policy—did not foreclose the parties from taking preliminary steps falling short of actual effectuation of the prohibited transaction. For example, an owner of blocked property could not assign it without a license. But freezing did not prevent him from negotiating a contract whereby he would assign it on certain terms and conditions upon the grant of the requisite license. Indeed, frequently, it was only by concluding his negotiations and presenting the plan in detail that he could provide the Treasury with an adequate basis for determining the merits of the application. Similar considerations applied to litigation. A creditor could not seize the blocked property of his alleged debtor without a license. But, as the Treasury advised him, he could, if he chose, seek an adjudication of his rights against the blocked national and take his chances that he

might ultimately be granted a license enabling him to reach the blocked property. By thus proceeding to adjudication, he could secure judicial determination of applicable questions of fact and of state law, thus again affording the Treasury Department a more informed basis for deciding whether the circumstances warranted a release of the property from federal controls. See Reeves, *Control of Foreign Funds*, 11 Law and Contemporary Problems 17, 44-45.²⁰ That no more was intended by the permission to bring suit was widely understood by the bar. See discussions in Berger and Bittker, *Freezing Controls: The Effects of an Unlicensed Transaction*, 47 Col. L. Rev. 398 (1947)²¹; Reeves, *supra*, 44-49; and Reeves, *Policies of the United States Treasury as Applied to Blocked Funds in Litigation*, 113 N. Y. L. J. 2180, 2200 (1945).

The limited effect of paragraph 4 of General Ruling No. 12 was again reaffirmed in unmis-

²⁰ The author quotes, at p. 45, the following statement made by the United States in its brief *amicus curiae* in *Commission for Polish Relief, Ltd. v. Banca Nationala a Romaniei*, 288 N. Y. 332, 43 N. E. 2d 345:

“Indeed the Treasury regards the courts as the appropriate place to decide disputed claims and suggested to parties that they adjudicate such claims before applying for a license to permit the transfer of funds. The judgment was then regarded by the Treasury as the *equivalent of a voluntary payment order without the creation or transfer of any vested interest*, and a license was issued or denied on the same principles of policy as those governing voluntary transfers of blocked assets.” (Italics supplied.)

takable terms by the Treasury Department in Public Circular No. 31, issued on August 2, 1946, 11 F. R. 8351:

* * * * *

(3) An attachment is a "transfer." See paragraph (5) of General Ruling No. 12, where the term "transfer" is defined as including "the issuance, docketing, filing, or other levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment." *An unlicensed attachment, therefore, cannot operate to transfer or create any interest in blocked property.* Nor can it serve as a basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any blocked property.

(4) Paragraph (4) of General Ruling No. 12 does not constitute a license authorizing the seizure or creation of any interest in blocked property by attachment proceedings or other legal process. This paragraph merely is a formal statement of the position which the Treasury Department has always taken with respect to litigation affecting blocked property—that it does not desire to interfere with such litigation so long as it is clearly understood that the judicial process cannot, without a license or other authorization from the Secretary of the Treasury, operate to transfer or create any interest in blocked property.

Thus the proviso of paragraph (4) specifies that "no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license." *In issuing paragraph (4), the Treasury Department did not undertake to decide for the courts whether they should exercise jurisdiction. It simply prescribed that jurisdiction could be exercised only on the basis that if a Treasury license was not issued, the judicial process could not operate to transfer or create any interest in blocked property, nor could it be the basis for the assertion or recognition of any other right, remedy, power, or privilege with respect to the property. [Italics added.]*

Whether the courts of a particular state will permit jurisdiction over an absent defendant to be founded on such a limited control by its officers of the defendant's property, or whether a court will initially entertain proceedings in which it is powerless to render an unrestricted judgment against blocked funds, are questions which fall outside this case. The only issue here is whether petitioners acquired any proprietary interest in the particular accounts. In the face of Executive Order No. 8389 and General Ruling

No. 12, it is manifest that they could acquire no such interest after June 14, 1941, in the absence of a Treasury license.²¹

Petitioners seek comfort from the fact that in the case of *Commission for Polish Relief, Ltd. v. Banca Nationala a Rumaniei*, 288 N. Y. 332, 43 N. E. 2d 345, the Treasury, appearing as *amicus curiae*, advised the New York Court of

²¹ Of the cases cited by petitioners, the only one which supports their contention to the contrary is *Sun Insurance Office, Ltd. v. Arauca Fund*, 84 F. Supp. 516 (S. D. Fla.). The court stated in that case:

"* * * the libelant herein had a valid attachment lien on the vessel by virtue of its attachment of July 12, 1941, notwithstanding the fact that no license authorizing said attachment was secured from the Secretary of the Treasury under the provisions of Executive Order 8389. No license or permit under said Executive Order was required to validate libelant's attachment lien." [Pp. 518-519.]

Nothing on this point appears in the opinion beyond the bare statement quoted above. There is no discussion or analysis whatever of the controls or of their purpose and there is no way of ascertaining how the court arrived at its conclusion. In the face of the language of the Order and the regulations, and this Court's definitive decision in *Propper*, the conclusion is believed untenable. The decision in *Sun Insurance* was not appealed by the Custodian because the court held on other grounds that the libelant was not entitled to a recovery.

Murray Oil Products Co. v. Mitsui & Co. Ltd., 55 F. Supp. 353 (S. D. N. Y.), affirmed, 146 F. 2d 381 (C. A. 2), discussed at length by petitioner McCarthy (Brief in No. 314, 315, p. 34 *et seq.*), decided only the merits of an attaching creditor's claim against his debtor. The Court expressly reserved decision on the issue here presented—the attaching creditor's rights *vis-a-vis* the Custodian—pointing out (p. 356) that it would be necessary for the plaintiff to apply to the Custodian for payment.

Appeals that it believed jurisdiction might be exercised on the basis of a writ of attachment directed against a nonresident's blocked property. But while petitioners repeatedly emphasize this aspect of the Treasury's position, they are prone to overlook, throughout their arguments, the limiting condition: That no interest in the property might pass unless and until a license was obtained. The Government's brief in the *Polish Relief* case stated:

An attachment action against a national's blocked account is an attempt to obtain an unlicensed assignment of the national's interest in the blocked account—nothing more and nothing less.

In this sense, the attachment action might be regarded as a levy upon the national's contingent power (i. e. contingent upon Treasury authorization) to transfer all his interest in the blocked account to A; any judgment in the attachment action resulting in giving A a contingent interest in the account equivalent to what he would have obtained by voluntary assignment.

The value of such an interest is of course problematical. Whether it is worthless or worth full value will depend upon whether the transfer sought is in accordance with the Government's policies in administering freezing control.

Under this analysis of what the nature of any attachment action against a blocked account must be, in the light of the pur-

poses of freezing control, it is suggested that an attachment action of this nature might well be allowed in the New York courts.

The fact that the contingent interest involved in an attachment action such as that in question is *null and void unless authorized by the Secretary of the Treasury* should not be regarded as preventing such contingent interest from being the basis for an attachment action. An interest which is *null and void unless authorized by the Secretary* is not the same as an interest which is *null and void* unconditionally. Many of the interests which have already been the subject of attachment in the New York courts were also, from a realistic point of view, conditionally null and void. The fundamental issue, as indicated by the decisions in the New York courts, is whether the interest involved may, upon the happening of a certain condition ripen into a vested interest. If this is possible, and the condition is not too unreal, the courts will allow the attachment action. It is believed that the condition that the Secretary of the Treasury may authorize a transfer, if such transfer is in accordance with the policies of the Federal Government, is not too unreal a condition. [pp. 52-53.] [Italics in original.] "

" A copy of this brief is being filed with the clerk.

The Court of Appeals adopted the Treasury view. It declared, first, that "the words of the Chief Executive of the nation must be taken to have *deprived the defendant of power to transfer any interest* in these blocked accounts except through the medium of assignment subject to a releasing of the credit by the Secretary of the Treasury", 288 N. Y. at p. 337, 43 N. E. 2d at p. 347 [italics added]. It then went on to hold that the attachments were nonetheless sufficient to permit an adjudication of the rights of the parties, stating (288 N. Y. at p. 338, 43 N. E. 2d at p. 347):

The Executive Order did not forbid attachment of the conceded interest of the defendant in the credits upon which the levies were made. For all we know, payment of the blocked accounts to the credit of this action can be permitted consistently with the purpose of the Order. We are not to presuppose that this will inevitably be refused in the event of a judgment for the plaintiff. * * * The lien of an attachment is always hypothetical in some degree. A "seizure subject to license" was, we think, sufficient for the purpose of jurisdiction in rem over the deposits in question.

Three dissenting judges took the position that the "interest" sought to be attached was too "illusory" and that the cause should not be entertained (288 N. Y. at p. 341, 43 N. E. 2d at p.

349). In reaching their respective decisions, however, both the majority and the dissenting judges explicitly determined that, in the face of the Executive Order, neither the attachment nor the judgment of the court could transfer any interest in the funds in the absence of a license.

Petitioners also question the correctness of the Treasury position. They say that under the doctrine of *Pennoyer v. Neff*, 95 U. S. 714, a court has no jurisdiction over a nonresident defendant unless there is a valid seizure of his property within the state. It is apparently their view that a "seizure subject to license" could not confer jurisdiction and that any judgment based upon such a "seizure" would suffer from constitutional infirmities. Accordingly, they urge that the Treasury's statements that suits might be instituted by attachment should be interpreted (notwithstanding the limiting condition stated) to mean that an attaching creditor required no license in order to acquire an indefeasible lien interest in blocked property.

We do not believe that the doctrine of *Pennoyer v. Neff* leads to any such conclusion.²⁵ The decisions clearly indicate that if there is property of a nonresident within a state and

²⁵ In *Pennoyer*, the state court had no personal jurisdiction over the nonresident and no process whatever had been issued against his land within the state prior to judgment. The holding was that an execution sale of the land based on a purported personal judgment would not be given full faith and credit in the federal courts.

some means whereby the court may assert control over that property, jurisdictional requirements are satisfied, provided reasonable notice is given. Chief Justice Holmes stated in *Tyler v. Judges of the Court of Registration*, 175 Mass. 71, 78, 55 N. E. 812, 815, that "when it is considered how purely formal such an act [seizure] may be, and that even adverse possession is possible without ever coming to the knowledge of a reasonably alert owner, I cannot think that the presence or absence of the form makes a constitutional difference." That there is no requirement of an unconditional or absolute seizure is emphasized by this Court's decision in *Securities Savings Bank v. California*, 263 U. S. 282, which involved an action brought by California against a local bank to have unclaimed deposits transferred to the State and declared escheat. It was held that notice to foreign depositors by publication was sufficient although there had been no actual seizure of the funds. Mere service of the complaint upon the bank was found to meet constitutional requirements. Cf. *Pennington v. Fourth National Bank*, 243 U. S. 269. And see also *The Requirement of Seizure in the Exercise of Quasi in Rem Jurisdiction: Pennoyer v. Neff Re-examined*, 63 Harv. L. Rev. 657 (1950).

The same jurisdictional principle is reflected in the statutes of New York and other states.

Thus, Section 232 (6) of the New York Civil Practice Act authorizes service of nonresidents by publication "where the complaint demands judgment that the defendant be excluded from a vested or contingent interest in or lien upon specific real or personal property within the state."²⁴ That course was followed in *Feuchtwanger v. Central Hanover Bank and Trust Co., et al.*, 288 N. Y. 342, 43 N. E. 2d 434, in which the plaintiff sought to impress a trust upon certain deposits held by a New York bank in the name of a French bank. Rejecting the argument of the defendants that there was no jurisdiction over the French bank because there had been no seizure by attachment, the New York Court of Appeals, citing this Court's decision in *Securities Savings Bank v. California*, *supra*, stated that it was enough that there was "property within this State . . . subject to its dominion" (288 N. Y. at p. 345, 43 N. E. 2d at p. 435). To the same effect see *Pilger v. Sutherland*, 57 F. 2d 604 (C. A. D. C.); *Doerschuck v. Mellon*, 55 F. 2d 741 (C. A. D. C.); *Tyler v. Judges of the Court of Registration*, *supra*; *Disconto Gesellschaft v.*

²⁴ The United States Judicial Code contains a substantially similar provision, 28 U. S. C. § 1655. Its operation is not dependent upon a seizure. *Jellenik v. Huron Copper Mining Co.*, 177 U. S. 1; *Continental Trust Co. v. Shunk Plow Co.*, 263 Fed. 873 (C. A. 5), certiorari denied, 253 U. S. 488.

Umbreit, 127 Wis. 651, 106 N. W. 821, affirmed on other grounds, 208 U. S. 570.²⁵

Further evidence that a seizure is not constitutionally necessary in order to confer jurisdiction over a nonresident is the fact that in numerous states service of a writ of garnishment or attachment is not deemed to give a lien or other property interest prior to judgment or execution thereon. In the course of his dissenting opinion in *Sanders v. Armour Fertilizer Works*, 292 U. S. 190, 206-207, Justice Cardozo, speaking of "proceedings under writs of garnishment or attachment", observed that in Illinois the writ is "in substance * * * a monition whereby the defendant is apprised that he will be acting at his peril if he makes a *voluntary* payment to the original creditor, the peril consisting in this, that he may have to pay again."²⁶ The Justice added that in some jurisdictions the service of the writ

²⁵ In the *Disconto Gesellschaft* case, the Supreme Court of Wisconsin stated (127 Wis. at pp. 670-671, 106 N. W. at pp. 826-827) :

"It has also been held by this court * * * that it is not essential that the property within the state be seized by writ of attachment, but that, if the facts required by the statute to authorize the order for publication appeared by proper affidavit, the court would acquire jurisdiction to render a judgment good at least against the property described in the moving papers, providing it had not been removed from the state or sold to an innocent purchaser before the rendition of the judgment."

²⁶ This was the nature of attachment according to the custom of London "from which * * * have sprung the systems of attachment laws in the United States." *Drake on Attachment*, 7th Ed., 1891, Sec. 450.

is held to impose "a fixed and present lien", that sometimes the lien is "spoken of as a *quasi* lien or an inchoate one", and that "sometimes the Illinois rule is accepted, and there is said to be no lien, or one that does no more than restrain the garnishee from making voluntary payments. * * * Little is to be gained by dilating upon these and like decisions, for they are rooted in local laws or customs. Garnishment and attachment today are statutory remedies."²⁷

Only recently this Court had occasion to consider whether a California attachment procured by an individual creditor was senior to a United States tax lien filed at a later date. *United States v. Security Trust and Savings Bank*, 340 U. S. 47. Holding that the tax lien took precedence, Mr. Justice Minton, speaking for the Court, pointed out that California decisions indicate that "the attaching creditor obtains only a potential right or a contingent lien." He added (340 U. S. at p. 50):

* * * Numerous contingencies might arise that would prevent the attachment lien from ever becoming perfected by a

²⁷ See also *In re Marsters*, 101 F. 2d 365 (C. A. 7), certiorari denied, 306 U. S. 663; *Cramer v. Phoenix Mutual Life Ins. Co.*, 91 F. 2d 141 (C. A. 8), certiorari denied, 302 U. S. 739; *Ex Parte Foster*, 9 Fed. Cas. 508 (C. C. D. Mass.); *Pennsylvania Co. v. United Railways*, 26 F. Supp. 379 (D. Me.); *Rowen v. Port Huron Engine & Thresher Co.*, 109 Ia. 255, 80 N. W. 345; *Matsuda v. Noble*, 200 P. 2d 962 (S. Ct. Or.); *Newberry v. Meadows Fertilizer Co.*, 203 N. C. 330, 166 S. E. 79.

judgment awarded and recorded. Thus the attachment lien is contingent or inchoate—merely a *lis pendens* notice that a right to perfect a lien exists.

Nor can the doctrine of relation back—which by process of judicial reasoning merges the attachment lien in the judgment and relates the judgment lien back to the date of attachment—operate to destroy the realities of the situation. * * *

It is plain that the perfecting of an attachment lien may be subject to “numerous contingencies” under state law. It is equally clear, where blocked property is concerned, that the federal government may add the further condition that a license must be obtained. This does not mean that the New York courts were without power or jurisdiction to adjudicate the rights of these petitioners as against the German depositors. Jurisdiction could be predicated upon the presence of the blocked property within the state, coupled with notice by publication. The function of attachment procedure in providing a foundation of jurisdiction is discrete from the function, which it also frequently serves, of providing immediate security to the plaintiff.²⁸ This distinc-

²⁸ * * * those actions which the courts have considered to constitute a ‘seizure’ for jurisdictional purposes have not always been treated as assuring plaintiff’s security interest; * * * the law of jurisdiction, and the law of liens and priorities, have developed without cross-fertilization.” *The Requirement of Seizure in the Exercise of Quasi in Rem Jurisdiction: Pennoyer v. Neff Re-Examined*, 63 Harv. L. Rev. 657, 670.

tion was the basis of the Treasury's declaration that freezing did not prohibit recourse to the state courts and to their judicial process (including writs of garnishment and attachment), although it did prevent, absent a license, the acquisition of any proprietary interest in blocked funds. The same distinction underlies the decision in the *Polish Relief* case in which the New York Court of Appeals, taking full account of the Treasury regulations, held that service of a writ of attachment on a New York Bank holding a nonresident's blocked funds was "sufficient for the purpose of jurisdiction" although the "seizure [was] subject to license."

Respondent does not contend that the attachments were absolutely void or that they were illegal. He agrees that freezing did not purport to prohibit the resort to judicial process. He states simply that transfers in blocked property were proscribed and that the judicial hand was stayed to that extent. Not attachments, but transfers, were controlled. That means that a fixed or absolute lien (as distinguished from "a potential right or a contingent lien") could not be created without a release of the property from federal control. Since the perfecting of a fixed lien is characteristically subject to numerous contingencies under state law, *e. g.*, the entry of a judgment in plaintiff's favor, it would seem clear that the imposition of a further condition by operation of federal law—the procurement of a

license—is not inconsistent with proceedings by way of attachment.

In effect, then, the Treasury said this:—Blocked property is subject to a federal injunction against transfer. This does not prevent a state court from issuing a writ which also directs the holder of the blocked property to keep it intact. And if the state court, in these circumstances, regards its own process as offering a sufficient promise of control to warrant an exercise of its jurisdiction, there is no objection to its declaring the rights of a suitor as against the owner of the blocked property. But the state court's power to confer a proprietary interest upon the suitor necessarily awaits a lifting of the federal injunction.

Even if we assume *arguendo* that the Treasury was wrong in its belief that such a limited or contingent control of the property would enable a state court to adjudicate the rights of the private parties, and that the New York Court of Appeals was likewise wrong in holding a "seizure subject to license" an adequate foundation of jurisdiction (*Polish Relief* case, *supra*), there is still no blinking the fact that the Order and the Regulations did not permit any other kind of "seizure." The Order forbade "all transfers." The Regulations define "transfer" to include "the creation or transfer of any lien" (General Ruling 12, par. 5 (a)) and explicitly declare that "an unlicensed attachment * * * cannot operate to

transfer or create any interest in blocked property" (Public Circular No. 31, par. 3). The court below correctly determined that petitioners failed to acquire the property interests which they claim.²⁸

II. THE DISTRICT COURT WAS A PROPER FORUM FOR THESE PROCEEDINGS

Petitioners argue that the Custodian is engaged in a collateral attack on their New York judgments and that the courts below failed to accord those judgments full faith and credit. These arguments are rested on the assertion that "by this constructive seizure the state court took exclusive custody and control of the attached debts" (Brief in No. 298, p. 43). The premise is utterly false. The state court writs were issued *after* the federal government had asserted its paramount power over the alien property and they were necessarily subject to the federal controls. True, those writs in terms forbade the banks "to make or suffer any transfer of the debts" (*idem.*). But what petitioners overlook is that the President had previously enjoined all transfers of the funds (Executive

²⁸ As held below, petitioner McCloskey's claim to sheriff's poundage fees turns on whether the other petitioners acquired proprietary interests. If, as respondent contends, the property was federally controlled and the state's exercise of dominion was contingent upon a release of federal authority, it follows that the property was not impounded by the sheriff, either actually or constructively. The sheriff's fees for the ministerial acts of serving the writs have been paid and are not in issue here.

Order No. 8389), including transfers by judicial process. *Propper v. Clark*, 337 U. S. 472. The state court's assertion of control was, therefore, limited and conditional; it could not operate to dispose of interests in the property unless and until the earlier federal injunction was lifted. It is for that very reason that this Court held in *Propper* that a state court's appointment of a permanent receiver pursuant to a New York judgment was ineffective to confer title upon him in the absence of a federal license. There is no question of full faith and credit for the simple reason that the New York judgments never became operative with respect to property therefore blocked by the President.

Petitioners also urge that, as a matter of comity, the Custodian should have been required to go into the state courts for a clarification of his rights. Again, the *Propper* case is absolutely decisive against them. There, also, the Custodian went into the federal courts for a declaration of his rights under a vesting order. His course was upheld, notwithstanding the fact that the New York court had already entered a judgment purporting to bestow title to the property in issue upon a receiver. Following its earlier decision in *Markham v. Allen*, 326 U. S. 490,²⁰ the Court stated (337 U. S. at p. 493):

²⁰ In *Allen*, Chief Justice Stone, speaking for the Court, declared that Section 17 of the Trading With the Enemy Act "plainly indicates that Congress has adopted the policy of

The congressional purpose to put control of foreign assets in the hands of the President through the Custodian, so that there might be a unified national policy in the administration of the Act, argues strongly for federal determination of issues of rights in the blocked assets. Comity does not require abnegation to the extent that a federal court cannot adjudicate rights to the claim involved.

It should be noted further that in *Propper* there was an antecedent question of state law, whether an appointment of Propper as *temporary* receiver *prior* to freezing had given him title.²¹ *A fortiori*, where, as here, there was no disputed issue of state law, the exercise of federal jurisdiction²² was entirely appropriate.

permitting the Custodian to proceed in the district courts to enforce his rights under the Act, whether they depend on state or federal law" (326 U. S. at p. 496).

²¹ It was the appointment as permanent receiver which post-dated the order.

CONCLUSION

For the foregoing reasons, the judgments of the Court of Appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 1951.

APPENDIX

1. Joint Resolution of May 7, 1940, 54 Stat. 179:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (b) of section 5 of the Act of October 6, 1917 (40 Stat. 411), as amended, is hereby amended to read as follows:

"During time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by or to banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, and any transfer, withdrawal or exportation of, or dealing in, any evidences of indebtedness or evidences of ownership of property in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest, by any person within the United States or any place subject to the jurisdiction thereof; and the President may require any person to furnish under oath, complete information relative to any transaction referred to in this subdivision or to any property in which any such foreign state, national or political subdivision has any interest, including the production

of any books of account, contracts, letters, or other papers, in connection therewith in the custody or control of such person, either before or after such transaction is completed."

SEC. 2. Executive Order Numbered 8389 of April 10, 1940, and the regulations and general rulings issued thereunder by the Secretary of the Treasury are hereby approved and confirmed.

* * * * *

2. Trading With the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U. S. C. 1 et seq:

* * * * *

SEC. 5, as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App. 5:

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any

property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property, shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * *

SEC. 17. That the district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled "An Act to codify, revise, and amend the laws relating to the judiciary."

* * * * *

SEC. 34. (a) Any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian. No debt claim shall be allowed under this section if it was not due and owing at the time of such vesting or transfer, or if it arose from any action or transactions prohibited by or pursuant to this Act and not licensed or otherwise authorized pursuant thereto, or (except in the case of debt claims acquired by the Custodian) if it was at the time of such vesting or transfer due and owing to any person who has since the beginning of the war been convicted of violation of this Act, as amended, sections 1-6 of the Criminal Code (18 U. S. C. 1-6), title I of the Act of June 15, 1917 (ch. 30, 40 Stat. 217), as amended; the Act of April 20, 1918 (ch. 59, 40 Stat. 534), as amended; the Act of June 8, 1934 (ch. 327, 52 Stat. 631), as amended; the Act of January 12, 1938 (ch. 2, 52 Stat. 3); title I, Alien Registration Act, 1940 (ch. 439, 54 Stat. 670); the Act of October 17, 1940 (ch. 897, 54 Stat. 1201); or the Act of June 25, 1942 (ch. 447, 56 Stat. 390). Any defense to the payment of such claims which would have been available to the debtor shall be available to the Custodian, except that the period from and after the beginning of the war shall not be included for the purpose of determining the application of any statute

of limitations. Debt claims allowable hereunder shall include only those of citizens of the United States or of the Philippine Islands; those of corporations organized under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia or the Philippine Islands; those of other natural persons who are and have been since the beginning of the war residents of the United States and who have not during the war been interned or paroled pursuant to the Alien Enemy Act (50 U. S. C. 21); and those acquired by the Custodian. Legal representatives (whether or not appointed by a court in the United States) or successors in interest by inheritance, devise, bequest, or operation of law of debt claimants, other than persons who would themselves be disqualified hereunder from allowance of a debt claim, shall be eligible for payment to the same extent as their principles or predecessors would have been.

(b) The Custodian shall fix a date or dates after which the filing of debt claims in respect of any or all debtors shall be barred, and may extend the time so fixed, and shall give at least sixty days' notice thereof by publication in the Federal Register. In no event shall the time extend beyond the expiration of two years from the date of the last vesting in or transfer to the Custodian of any property or interest of a debtor in respect of whose debts the date is fixed, or from the date of enactment of this section, whichever is later. No debt shall be paid prior to the expiration of one hundred and twenty days after publication of the first such notice in respect of the debtor, nor in any event shall

any payment of a debt claim be made out of any property or interest or proceeds in respect of which a suit or proceeding pursuant to this Act for return is pending and was instituted prior to the expiration of such one hundred and twenty days.

(c) The Custodian shall examine the claims, and such evidence in respect thereof as may be presented to him or as he may introduce into the record, and shall make a determination, with respect to each claim, of allowance or disallowance, in whole or in part.

(d) Payment of debt claims shall be made only out of such money included in, or received as net-proceeds from the sale, use, or other disposition of, any property or interest owned by the debtor immediately prior to its vesting in or transfer to the Alien Property Custodian, as shall remain after deduction of (1) the amount of the expenses of the Office of Alien Property Custodian (including both expenses in connection with such property or interest or proceeds thereof, and such portion as the Custodian shall fix of the other expenses of the Office of Alien Property Custodian), and of taxes, as defined in section 36 hereof, paid by the Custodian in respect of such property or interest or proceeds, and (2) such amount, if any, as the Custodian may establish as a cash reserve for the future payment of such expenses and taxes. If the money available hereunder for the payment of debt claims against the debtor is insufficient for the satisfaction of all claims allowed by the Custodian, ratable payments shall be made in accordance with subsection (g) hereof to the extent permitted by the money available and additional payments shall

be made whenever the Custodian shall determine that substantial further money has become available, through liquidation of any such property or interest or otherwise. The Custodian shall not be required through any judgment of any court, levy of execution, or otherwise to sell or liquidate any property or interest vested in or transferred to him, for the purpose of paying or satisfying any debt claim.

(e) If the aggregate of debt claims filed as prescribed does not exceed the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall pay each claim to the extent allowed, and shall serve by registered mail, on each claimant whose claim is disallowed in whole or in part, a notice of such disallowance. Within sixty days after the date of mailing of the Custodian's determination, any debt claimant whose claim has been disallowed in whole or in part may file in the District Court of the United States for the District of Columbia a complaint for review of such disallowance naming the Custodian as defendant. Such complaint shall be served on the Custodian. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to the claim in question. Upon good cause shown such time may be extended by the court. Such record shall include the claim as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, and the determination of the Custodian with respect thereto, including any findings made by him. The court may, in

its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian, or could not reasonably have been adduced before him or was not available to him. The court shall enter judgment affirming, modifying, or reversing the Custodian's determination, and directing payment in the amount, if any, which it finds due.

(f) If the aggregate of debt claims filed as prescribed exceeds the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall prepare and serve by registered mail on all claimants a schedule of all debt claims allowed and the proposed payment to each claimant. In preparing such schedule, the Custodian shall assign priorities in accordance with the provisions of subsection (g) hereof. Within sixty days after the date of mailing of such schedule, any claimant considering himself aggrieved may file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the Custodian as defendant. A copy of such complaint shall be served upon the Custodian and on each claimant named in the schedule. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to such schedule. Upon good cause shown such time may be extended by the court. Such record shall include the claims in question as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, any findings or other determinations made by the Custodian.

todian with respect thereto, and the schedule prepared by the Custodian. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian or could not reasonably have been adduced before him or was not available to him. Any interested debt claimant who has filed a claim with the Custodian pursuant to this section, upon timely application to the court, shall be permitted to intervene in such review proceedings. The court shall enter judgment affirming or modifying the schedule as prepared by the Custodian and directing payment, if any be found due, pursuant to the schedule as affirmed or modified and to the extent of the money from which, in accordance with subsection (d) hereof, payment may be made. Pending the decision of the court on such complaint for review, and pending final determination of any appeal from such decision, payment may be made only to an extent, if any, consistent with the contentions of all claimants for review.

(g) Debt claims shall be paid in the following order of priority: (1) Wage and salary claims, not to exceed \$600; (2) claims entitled to priority under sections 191 and 193 of title 31 of the United States Code, except as provided in subsection (h) hereof; (3) all other claims for services rendered, for expenses incurred in connection with such services, for rent, for goods and materials delivered to the debtor, and for payments made to the debtor for goods or services not received by the claimant; (4) all other debt claims. No payment shall be made to claimants within a subordinate class unless the money from which, in accordance with subsection (d)

hereof, payment may be made permits payments in full of all allowed claims in every prior class.

(h) No debt of any kind shall be entitled to priority under any law of the United States or any State, Territory, or possession thereof, or the District of Columbia, solely by reason of becoming a debt due or owing to the United States as a result of its acquisition by the Alien Property Custodian.

(i) The sole relief and remedy available to any person seeking satisfaction of a debt claim out of any property or interest which shall have been vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the proceeds thereof, shall be the relief and remedy provided in this section, and suits for the satisfaction of debt claims shall not be instituted, prosecuted, or further maintained except in conformity with this section: *Provided*, That no person asserting any interest, right, or title in any property or interest or proceeds acquired by the Alien Property Custodian, shall be barred from proceeding pursuant to this Act for the return thereof, by reason of any proceeding which he may have brought pursuant to this section; nor shall any security interest asserted by the creditor in any such property or interest or proceeds be deemed to have been waived solely by reason of such proceeding. The Alien Property Custodian shall treat all debt claims now filed with him as claims filed pursuant to this section. Nothing contained in this section shall bar any person from the prosecution of any suit at law or in equity against

the original debtor or against any other person who may be liable for the payment of any debt for which a claim might have been filed hereunder. No purchaser, lessee, licensee, or other transferee of any property or interest from the Alien Property Custodian shall, solely by reason of such purchase, lease, license, or transfer, become liable for the payment of any debt owed by the person who owned such property or interest prior to its vesting in or transfer to the Alien Property Custodian. Payment by the Alien Property Custodian to any debt claimant shall constitute, to the extent of payment, a discharge of the indebtedness represented by the claim.

3. Executive Order No. 8389, April 10, 1940, 5 F. R. 1400, as amended by Executive Order 8785, June 14, 1941, 6 F. R. 2897:

By virtue of and pursuant to the authority vested in me by Section 5 (b) of the Act of October 6, 1917 (40 Stat. 415), as amended, by virtue of all other authority vested in me, and by virtue of the existence of a period of unlimited national emergency, and finding that this Order is in the public interest and is necessary in the interest of national defense and security, I FRANKLIN D. ROOSEVELT, PRESIDENT OF THE UNITED STATES OF AMERICA, do prescribe the following:

SEC. 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of, any foreign country designated in this Order, or any

national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent, outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarking of gold or silver coins or bullion or currency, by any person within the United States;

E. All transfers, withdrawals, or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

* * * * *

SEC. 3. The term "foreign country designated in this Order" means a foreign country included in the following schedule, and the term "effective date of this Order" means with respect to any such foreign

country, or any national thereof, the date specified in the following schedule:

(j) June 14, 1941—

Germany

SEC. 5.

E. The term "national" shall include,

(ii) Any partnership, association, corporation or other organization, organized under the laws of, or which on or since the effective date of this Order had or has had its principal place of business in such foreign country, or which on or since such effective date was or has been controlled by, or a substantial part of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly, such foreign country and/or one or more nationals thereof as herein defined,

F. The term "banking institution" as used in this Order shall include any person engaged primarily or incidentally in the business of banking, of granting or transferring credits, or of purchasing or selling foreign exchange or procuring purchasers and sellers thereof, as principal or agent, or any persons holding credits for others as a direct or incidental part of his business, or brokers; and, each principal, agent, home office, branch or correspondent of

any person so engaged shall be regarded as a separate "banking institution."

* * * * *

SEC. 7. Without limitation as to any other powers or authority of the Secretary of the Treasury or the Attorney General under any other provision of this Order, the Secretary of the Treasury is authorized and empowered to prescribe from time to time regulations, rulings, and instructions to carry out the purposes of this Order and to provide therein or otherwise the conditions under which licenses may be granted by or through such officers or agencies as the Secretary of the Treasury may designate, and the decision of the Secretary with respect to the granting, denial or other disposition of an application of license shall be final.

* * * * *

4. General Ruling No. 12, United States Treasury Department, April 21, 1942, 7 F. R. 2991:

(1) Unless licensed or otherwise authorized by the Secretary of the Treasury, (a) any transfer after the effective date of [Executive Order No. 8389, see General Ruling No. 4, par. (1), *supra*] is null and void to the extent that it is (or was) a transfer of any property in a blocked account at the time of such transfer; and (b) no transfer after the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account (irrespective of whether such property was in a blocked account at the time of such transfer).

(2) Unless licensed or otherwise authorized by the Secretary of the Treasury, no transfer before the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account unless the person with whom such blocked account is held or maintained had written notice of the transfer or by any written evidence had recognized such transfer prior to the effective date of the Order.

(3) Unless otherwise provided, an appropriate license or other authorization issued by the Secretary of the Treasury before, during, or after a transfer shall validate such transfer or render it enforceable to the same extent as it would be valid or enforceable but for the provisions of section 5 (b) of the Trading With the Enemy Act, as amended, and Order, regulations, instructions and rulings issued thereunder.

(4) Any transfer affected by the Order and/or this general ruling and involved in, or arising out of, any action or proceeding in any Court within the United States shall, so far as affected by the Order and/or this general ruling, be valid and enforceable for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated; *Provided, however,* That no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license.

(5) For the purposes of this general ruling:

(a) The term "transfer" shall mean any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent, or effect of which is to create, surrender, release, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property and without limitation upon the foregoing shall include the making, execution, or delivery of any assignment, power, conveyance, check, declaration, deed, deed of trust, power of attorney, power of appointment, bill of sale, mortgage, receipt, agreement, contract, certificate, gift, sale, affidavit, or statement; the appointment of any agent, trustee, or other fiduciary; the creation or transfer of any lien; the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment; the acquisition of any interest of any nature whatsoever by reason of a judgment or decree of any foreign country; the fulfillment of any condition, or the exercise of any power of appointment, power of attorney, or other power; *Provided, however,* That the term "transfer" shall not be deemed to include transfers by operation of law.

(b) The term "property" includes gold, silver, bullion, currency, coin, credit, securities (as that term is defined in section 2 (1) of the Securities Act of 1933, as amended), bills of exchange, notes, drafts, acceptances, checks, letters of credit, book credits, debts, claims, contracts, negotiable

documents of title, mortgages, liens, annuities, insurance policies, options and futures in commodities, and evidences of any of the foregoing. The term "property" shall not, except to the extent indicated, be deemed to include chattels or real property.

(c) The term "blocked account" shall refer to a blocked account (including safe deposit box) of a party to the transfer and shall have the meaning prescribed in General Ruling No. 4 except that it shall not be deemed to include an account not treated as a blocked account by the person with whom such account is held or maintained.

(d) The term "effective date of the Order" shall have the meaning prescribed in General Ruling No. 4 except that "the effective date of the Order" as applied to any person whose name appears on The Proclaimed List of Certain Blocked Nationals shall be the date upon which the name of such person first appeared on such list.

(e) The term "transfer by operation of law" shall be deemed only to mean any transfer of any dower, curtesy, community property, or other interest of any nature whatsoever, provided that such transfer arises solely as a consequence of the existence or change of marital status; any transfer to any person by intestate succession; any transfer to any person as administrator, executor, or other fiduciary by reason of any testamentary disposition; any transfer to any person as administrator, executor, or fiduciary by reason of judicial appointment or approval in connection with any testamentary disposition or intestate succession; and any transfer pursuant to (i) Netherlands Royal Decree of May 24, 1940, and (ii) Norwegian Pro-

visional Decree of April 22, 1940, concerning the monetary system, etc.

(6) Nothing contained in this general ruling shall be deemed to affect in any way criminal liability for violation of the Order, or the regulations, rulings, circulars, or instructions issued thereunder, or in connection therewith, or to otherwise modify any provision thereof.

By direction of the President.

5. Public Circular No. 31, United States Treasury Department, August 2, 1946, 11 F. R. 8351:

(1) Reference is made to General Ruling No. 12 relating to unlicensed transfers of blocked property. Reference is also made to General Ruling No. 19 relating to the release of Treasury controls over property vested by the Alien Property Custodian. This circular deals with the effect of such release on unlicensed attachments levied with respect to blocked property prior to the vesting thereof by the Custodian.

(2) Under paragraph (1) of General Ruling No. 12, interests in blocked property cannot be acquired, transferred, or created by unlicensed "transfers." Nor may an unlicensed transfer be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any blocked property.

(3) An attachment is a "transfer." See paragraph (5) of General Ruling No. 12 where the term "transfer" is defined as including "the issuance, docketing, filing, or other levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment." An

unlicensed attachment, therefore, cannot operate to transfer or create any interest in blocked property. Nor can it serve as a basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any blocked property.

(4) Paragraph (4) of General Ruling No. 12 does not constitute a license authorizing the seizure or creation of any interest in blocked property by attachment proceedings or other legal process. This paragraph merely is a formal statement of the position which the Treasury Department has always taken with respect to litigation affecting blocked property—that it does not desire to interfere with such litigation so long as it is clearly understood that the judicial process cannot, without a license or other authorization from the Secretary of the Treasury, operate to transfer or create any interest in blocked property. Thus, the proviso of paragraph (4) specifies that “no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license.” In issuing paragraph (4), the Treasury Department did not undertake to decide for the courts whether they should exercise jurisdiction. It simply prescribed that jurisdiction could be exercised only on the basis that if a Treasury license was not issued, the judicial process could not operate to transfer or create any interest in blocked property, nor could it be the basis for the assertion or recogni-

tion of any other right, remedy, power, or privilege with respect to the property.

(5) The Treasury Department has always considered that when the Alien Property Custodian has vested any property, it would not be in the national interest for the Treasury Department thereafter to grant licenses authorizing the creation or acquisition of any interest in the property. Formerly it was the practice of the Department, whenever it was notified by the Custodian that a particular property had been vested, to issue a specific release to the Custodian of all control of the property under Executive Orders Nos. 8389 and 9193. Paragraph (1) of General Ruling No. 19 constitutes a general release of such control in the case of all German and Japanese property vested by the Custodian. Paragraph (2) of the General Ruling is intended to make it clear that a release of control over any vested property to the Alien Property Custodian, whether by specific release or by reason of the General Ruling, operates as a final denial by the Secretary of the Treasury of any pending application for license or other authorization relating to such property and that no application for a license authorizing the creation, acquisition, or transfer of any interest in such property will thereafter be entertained or granted. The paragraph is thus a formal statement of what has always been the position of the Treasury Department—namely, that once blocked property has been vested by the Custodian, there is no longer any possibility that an unlicensed attachment may ripen through the issuance of a Treasury license into a seizure and acquisition of an interest in such blocked property.

(6) In view of the fact that the Alien Property Custodian has publicly announced his intention of vesting all German and Japanese property in the United States, it will be the general policy of the Treasury Department not to grant any licenses authorizing the creation or acquisition through legal process of any interest in blocked German or Japanese property.

6. Press Release No. 34, April 21, 1942, *United States Treasury Department: Documents Pertaining to Foreign Funds Control* (1946), pp. 71-73:

The Treasury Department, in a formal statement issued today, called attention to the fact that all unlicensed transfer of blocked assets in the United States are void and unenforceable.

General Ruling No. 12, issued by the Secretary of the Treasury, makes clear that unlicensed transfers of blocked assets in violation of the freezing orders, and transfers designed or having the effect of evading such orders, always have been void and unenforceable.

Secretary Morgenthau, commenting on today's general ruling, pointed out that these unlicensed transfers of blocked assets always have been void and unenforceable under the freezing orders and that today's ruling serves the purpose of emphasizing this fact for the benefit of any of the public who may have overlooked this aspect of freezing control.

He also called attention to the provisions of the ruling, making it possible for persons who have been parties to unlicensed transfers of blocked assets to file applications for licenses to validate these transfers.

"The Treasury, of course, wants to be reasonable about this matter," he stated. "We do not propose to allow our regulations, intended for the protection of our country and the United Nations, to become an instrumentality for defeating their interests or producing unconscionable advantages or unreasonable hardships. These matters can be dealt with by licenses, without undue interference with the purposes of freezing control."

Treasury officials pointed out that there are more than 7 billion dollars in blocked assets in the United States. The Government's policy on this matter, as reflected in today's formal ruling, has nullified attempts by the Axis to gain title to the billions of dollars in assets belonging to nationals of the countries overrun by the Axis. It has defeated efforts of the Axis to wrest control of such assets away from their lawful owners and hold them in the hopes that in the postwar period it will be possible to realize on such assets if freezing restrictions are lifted. Of equal significance is the fact that it has destroyed any possible black market in neutral countries for blocked assets—one of the ways the Axis would like to be able to obtain the foreign credit necessary to finance imports from neutral countries into Axis territory and also one of the ways the Axis would like to be able to gain the funds necessary to subsidize espionage, sabotage, and fifth-column activities in the United Nations, Latin America, and elsewhere.

Treasury officials explained that, based on the evidence of what the Axis was doing with assets of the overrun countries within their physical control, Axis efforts in an operation of this character would follow no

single pattern. Rather, they would run the gamut from outright duress—assignments at the point of a gun or with the Gestapo as “witnesses”—through to the more subtle “legal” transfers—the purchase of such blocked assets against payment in local currency obtained as occupation costs or by forced loan from banking institutions in the occupied areas. In these latter cases the point of the gun would not be leveled at the individual, but would be leveled at the central bank and “Quisling” governments who would provide the credit for the Axis to “buy” their country’s birthright.

The net effect of such transfers would not vary, however, they would be intended to mulct the overrun countries of the very life-blood of any postwar reconstruction, namely, the foreign exchange needed to obtain the goods and services necessary for rebuilding the economies of these countries. Axis war psychology would be benefited also—by depriving the holders of their title to these assets the Axis would encourage a spirit of defeatism and a willingness to succumb to the German “new order.”

Officials also explained that, based on the operation of the neutral black market in looted assets physically in the control of the Axis, it was easy to anticipate the type of black market the enemy might try to foster for “blocked assets.” This neutral blackmarket operation would be designed to give the Axis immediate returns on blocked assets even though the Axis could not get such assets out from under our freezing regulations. In this case the assets would be assigned or otherwise transferred to neutral speculators at heavy discount in order that the Axis could obtain credit now to buy goods and services in neutral coun-

tries and thus assist the war effort. Of course some of these blackmarket operations would be for the obvious purpose of lining the pockets of Axis officialdom as insurance against the day when the Axis is crushed. Neutral speculators would either hold such assignments with the intent of salvaging on them after the war or in the hope of being able to squeeze the blocked assets through the freezing control by one trick or another.

As was pointed out, since freezing control makes null and void, or unenforceable all transfers with respect to blocked assets unless licensed by the Secretary of the Treasury, Axis attempts to gain title to these assets are frustrated and the true owner's interests are protected and he continues to have a valuable stake in a victory by the United Nations.

Commenting upon today's ruling, Secretary Morgenthau stated: "This Government served notice on the world when we froze the assets of Norway and Denmark on April 10, 1940, that we did not intend to permit the Axis to realize any use or benefit from Norwegian and Danish assets in the United States. Since that time we have consistently pursued this policy with respect to every country falling under the Axis yoke. The policy of this Government always has been unequivocal. We will not allow the Axis, directly or indirectly, to gain any interest in the 7 billion dollars in blocked assets in this country. Neither those funds nor any interest in them will be used against the United Nations by the Axis. Neither will they be used as a part of Germany's economic 'new order' in Europe or Japan's 'co-prosperity sphere' in the Pacific."

It was emphasized that, while freezing control attempted to interfere as little as possible with normal legitimate commercial transactions, still the Government was combatting a menace of sweeping proportions and was compelled to block all corrosive efforts of infiltration through loopholes. Freezing control and the Government's policy is therefore comprehensive and the licensing technique must be freely used to prevent hardship in legitimate cases. Thus, under the freezing orders, more than 80 general licenses have been issued, permitting vast categories of transactions under appropriate safeguards without even filing an application. In addition, more than 400,000 specific licenses also have been issued.

Paragraph (1) of today's general ruling deals with unlicensed transfers made after the effective date of the freezing orders involving property in blocked accounts. If any such transfer was made after the account was actually blocked, then the transfer is null and void unless licensed. Thus, if a bank blocked the account of a national of Denmark on April 10, 1940, and on June 10, 1940, the national attempted to assign title to the account to a German, the transfer would be null and void unless the Treasury licensed it. On the other hand, if a transfer were made before the account was actually blocked, but attempt was made to enforce it while the account was in fact blocked, the transfer would be unenforceable. By way of example; On July 15, 1941, John Doe, resident in Argentina, assigned his account with an American bank to Richard Roe in the United States. On September 15, 1941, the Treasury instructed the bank to block

the account of John Doe as a national of Rumania. After September 15, 1941, the assignment would be unenforceable against John Doe's blocked account unless the transfer were licensed by the Treasury Department.

Paragraph (2) of the general ruling deals with transfers alleged to have been made before the effective date of the freezing orders but involving accounts thereafter blocked. These transfers are unenforceable against blocked accounts unless the person with whom the blocked account was held or maintained had written notice of the transfer or had recognized it in writing prior to the effective date of the Order. Thus, if in the example above, the national of Denmark had assigned the bank account to the German in 1937 and the bank was not notified of the assignment until June 10, 1940, the assignment would be unenforceable against the blocked account unless licensed. If, on the other hand, the bank was notified in writing of the assignment before April 10, 1940, then the assignment is enforceable against the blocked account (but, of course, payment from the blocked account could only be made pursuant to Treasury license).

Treasury officials pointed out that the policy behind paragraph (2) of the general ruling was understandable. If the general ruling had been merely prospective in operation, it would be easy for Axis agents to validate transfers obtained under duress by the subterfuge of dating them prior to the effective date of the Executive Order. This would, of course, defeat one of the major purposes of freezing control. Officials pointed out that in those cases where

notice of the transfer was given to the person maintaining the account in this country and where the transfer had been accepted by that person as valid, the provisions of the general ruling are inapplicable since under those circumstances the notice is an adequate precaution to guarantee that the transfer was made prior to the effective date of freezing control.

Paragraph (3) of the ruling provides that a license issued by the Treasury Department, either before or after a transfer, completely validates the transfer for the purposes of freezing control. Of course, if an assignment would have been invalid without freezing control (e.g., because not properly executed), a Treasury license does not purport to remedy this type of invalidity.

Paragraph (4) is but a formal statement of the position which the Treasury Department has always taken on litigation (including attachments) affecting blocked assets. The Treasury has no desire to limit the bringing of suits in courts within the United States: *Provided*, That no greater interest is created by virtue of the attachment, judgment, etc., than the owner of the blocked account could have voluntarily conferred without a license. Thus, the Treasury does not want to interfere with the orderly consideration of cases by the courts provided that the results of court proceedings are subject to the same policy consideration from the point of view of freezing control as those arising through voluntary action of the parties.

Paragraph (5) defines various terms employed in the ruling. For example: the term "transfer" is given a very comprehensive meaning, excepting only certain

types of transfers by operation of law (e.g., transfer by intestate succession). The term "property" is broad but by and large does not include mere chattels or real property. The term "blocked account" is in effect limited to accounts actually treated as blocked accounts by the person with whom such account is held or maintained.

Paragraph (6) is technical in character and reserves the full right of the Government to prosecute for violations of the freezing orders and emphasizes that General Ruling No. 12 is not intended to modify outstanding freezing orders, regulations, etc.

